Supreme Court, U.S.
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No. __-____

IN THE
Supreme Court of the United States

October Term, 1993

FRANK ATONIO, ALAN LEW, CURTIS LEW, JOAQUIN ARRUIZA, RANDY DEL FIERRO, CLARKE KIDO, LESTER KURAMOTO, BARBARA VIERNES, as administratrix of the Estate of Gene Allen Viernes, MARGARET BACLIG, as administratrix of the Estate of Eugene Baclig, and all others similarly situated,

Petitioners,

v.

WARDS COVE PACKING COMPANY, INC., CASTLE & COOK, INC., COLUMBIA WARDS FISHERIES and UNITED STATES OF AMERICA

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Are the rules governing burden of proof and evidence of causality in disparate impact cases in §§104 and 105 of the Civil Rights Act of 1991 ("the Act") procedural in nature, so as to justify application to pending cases?

2. When Congress prescribes a different rule of decision for a single pending case than for all other cases, as it did in §402(b) exempting *only* this case from the disparate impact provisions of the Act, does it violate,

   a. Separation of powers?

   b. Equal protection guarantees implicit in the due process clause of the Fifth Amendment?

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JURISDICTION

The judgment of the Court of Appeals was entered on December 7, 1993. A timely petition for rehearing was denied on January 31, 1994. The Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVSIONS AND STATUTES

Art. 3, §3 of the Constitution provides in pertinent part,

> The judicial Power of the United States, shall be vested in the supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

The Fifth Amendment to the Constitution provides

in pertinent part, "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

Section 402(b) of the Civil Rights Act of 1991 ("the Act") provides:

> CERTAIN DISPARATE IMPACT CASES.--Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.

105 Stat. at 1099, *reprinted in* 42 U.S.C. §1981 note at 717 (Supp. III 1991).

Sections 104 and 105 of the Act provide in pertinent part:

> (m) The term "demonstrates" means meets the burdens of production and persuasion.
>
> * * *
>
> (k)(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if --
>
> > (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent

fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision making process are not capable of separation for analysis, the decision making process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by sub-

> paragraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

42 U.S.C. §§2000e(m) and 2000e-2(k) (Supp. III 1991).

STATEMENT UNDER RULE 29.4(b)

This proceeding draws into question the constitutionality of §402(b) of the Civil Rights Act of 1991, 105 Stat. 1071, 1099 (1991). The United States was granted leave to intervene under 28 U.S.C. §2403 in the Court of Appeals. The Court of Appeals did not otherwise certify under 28 U.S.C. §2403(a) to the Attorney General the fact that the constitutionality of this provision has been drawn into question.

STATEMENT OF THE CASE

This case was before the Court during the 1988 term. 490 U.S. at 642. The petition concerns issues which arose after remand.

This case is a class action under Title VII, 42 U.S.C. §2000e *et seq.*, which challenges a pattern of racial discrimination in jobs, housing and messing at three Alaska salmon canneries.[1]

---

[1] The case originally encompassed two other canneries, Ekuk and Alitak, which are run by Wards and Castle as part of their Columbia Wards Fisheries joint venture. However, claims against the venture canneries were dismissed, as were 42 U.S.C. §1981 claims against Wards

The employers are Wards Cove Packing Co., Inc. ("Wards"), which owns Wards Cove and Red Salmon canneries, and Castle & Cooke, Inc. ("Castle"), which owns Bumble Bee cannery.[2] The ciass consists of all non-whites who are now, will be or have been at any time since March 20, 1971 employed at designated canneries.

The district court had jurisdiction under 42 U.S.C. §§1343(4) and 2000e-5 (f)(3).

1. Overview of Claims.

The canneries are staffed almost entirely by migrant, seasonal workers. All but one of the canneries are located in remote regions of Alaska. The employers provide bunkhouses and meals to workers at the canneries.

The Alaska salmon canning industry has been heavily non-white since the turn of the century. The percentage of non-white employees in the industry was 40% to 70% during 1906-1978 and stabilized at about 47% to 50% part way through this period.

The work force at Wards and Castle reflects industry-wide figures, for it has been about 43% non-white overall since 1970. However, non-whites are absent or all but absent from tender, fishing, machinist, beach gang, quality control, clerical, carpenter, administrative and

---

and Castle.

[2] Castle has changed its name to Dole Food Company, Inc.

miscellaneous jobs.

During 1971-80, five of these departments at Bumble Bee and Red Salmon canneries were at least 94% white and six at Wards Cove cannery were at least 93% white.

Several practices are significant against this background.

First, the employers use essentially segregated hiring channels for different jobs, which prevents non-whites from competing on the basis of qualifications with whites. (App., p. A-33 through A-37.) The employers recruit from non-white sources such as Alaska Native villages, foremen of Asian descent and the heavily Filipino Local 37, ILWU, but only for the lowest paying jobs. To fill higher-paying jobs, they rely on informal word-of-mouth recruitment among friends and relatives of white foremen and superintendents. (*Ibid.*)

Second, the employers race-label jobs, bunkhouses and messhalls. (App., p. A-40.) Company records refer to "Fillipino cannery workers," "Native cannery workers," the "Filipino union," "Philippine Bunkhouse," "Native Galley Cook," and "Filipino Mess." (App., p. A-186.) A mail slot in the office of one cannery is marked "Oriental bunkhouse." (App., A-187.)

Third, the employers rely on subjective hiring criteria for jobs at issue. The district court found:

> Qualifications for any individual position depend to a certain extent on . . . the age

> and condition of equipment, skill level of other incumbents and supervisors, and other such factors.

(App., p. A-171 through A-172.) The employers' expert on qualifications testified "jobs are often structured around the skills of the people who are available to fill them, rather than the other way around." (Tr. 2941, 3000.) He prepared qualifications for litigation, which the district court found could be "reasonably required" (App., p. A-179), but which the expert testified were never actually applied. (Tr. 3113; *see also* Tr. 3067.) A home office employee who recruited in nearly all upper level jobs acknowledged "there were no set qualifications a person had to meet." (Tr. 622-25, 627-28, 636-37.) A fish boss testified "[t]here were no qualifications" for fishing boat crews, since each captain decided what -- if any -- criteria to impose. (Dep. Aiello 17-19; *see also* App., p. A-184.) The district court remarked on the "general lack of objective job qualifications." (App. A-202.)

Fourth, the employers maintain segregated housing (App., p. A-37 through A-38), which almost invariably leaves non-whites with the worst bunkhouses.

2. "Bottom Line" Statistics.

The percentage of non-whites working in the Alaska salmon industry during 1906-39 and 1941-55 was between 47% and 70%, it stabilized at about 47% to 50% toward the end of this period and a sample of about half the industry showed it to be 48% non-white during 1970-78. (App., p. A-24, A-168 through A-169.) Yet the district court found the labor supply for both unskilled and skilled

jobs to be only 10% non-white. (App., p. A-166, A-221 through A-222.)

Since the Census is dominated by people unwilling to take migrant, seasonal work, two of the employees' experts -- a labor economist and a demographer -- found industry statistics to be the best available measure of the racial mix of the labor supply. From these statistics, they concluded the labor supply is about 47% non-white.

Using the 47% non-white figure, the employees' labor economist found non-whites were under-represented in upper-level jobs at statistically significant levels. There are no available statistics by race on people qualified for the more skilled jobs in the industry. Wards and Castle have no fixed or objective qualifications. Consequently, he based his computations solely on jobs without significant skills barriers, which means he assumed Wards and Castle hired every available non-white qualified for truly skilled jobs, certainly a conservative assumption.

Even the employers' labor economist concluded non-whites were absent from several upper-level jobs at statistically significant levels.

> "I conclude that *[at Wards] non-whites are significantly under-represented in hiring in the tender job family which could be the result of racial discrimination.*"
>
> * * *
>
> [*The under-representation of non-whites in the tender job family at Red Salmon is] "statistically significant at the 5% level.* In the tender job family the under-representation of non-

> whites *could be the result of racial discrimination.*"
>
> * * *
>
> "I conclude that *non-whites were significantly underrepresented in hiring in the fisherman and machinist job family at South Naknek [i.e., Bumble Bee], which could be the result of racial discrimination.*"

(Tr. 1870-73; *see also* Tr. 1875.) (Emphasis added.) In fact, he characterized the statistics for Bumble Bee as "fairly conclusive." (Tr. 1941.) The departments from which he found non-whites were significantly absent are among the largest and most lucrative at the canneries.

Similarly, the employers' labor economist found non-whites were underrepresented at Wards in machinist, carpenter and fishing jobs, but not at statistically significant levels. And he found non-whites were under-represented at Castle in carpenter, beach gang, tender, culinary and store or stockroom jobs, but not at statistically significant levels.

Wards and Castle maintained no records on the disparate impact of their practices. They destroyed applications while the case was pending, even after employees requested them in discovery in this case. (App., p. A-223 through A-224.)

3. Proceedings Through Remand.

Following trial in 1982, the district court dismissed all disparate treatment and disparate impact claims. It declined to apply the disparate impact approach to

subjective practices.

The Court of Appeals initially affirmed, but on rehearing en banc it held the disparate impact approach could be applied to subjective practices. The en banc court sent the case back to the original panel, which reversed dismissal of disparate impact challenges to nepotism, lack of objective qualifications, use of separate hiring channels, word-of-mouth recruitment, segregation in housing, segregation in messing and race labeling. Because it was not clear what, if any, job qualifications were actually applied, the panel also required findings on this issue.

The Court reversed and remanded. It held statistics showing racial stratification did not make a *prima facie* case of disparate impact. 490 U.S. at 650-55. It required employees offering "bottom line" statistics in a disparate impact case to show which practices caused the disparity in the work force. *Id.* at 656-58. It defined the employer's rebuttal burden as one of business justification. *Id.* at 659-66. It also held the employees bore the burden of persuasion to disprove business justification. *Id.* at 659-60.

On remand, the district court heard the case on the original record, despite a request by the employees to offer new evidence. Once again, the district court dismissed. Once again, the employees appealed.

4. Intervening Legislation.

While the case was on appeal, Congress passed the Civil Rights Act of 1991 ("the Act") largely to modify or

overturn eight of the Court's decisions,[3] chief among which was its decision in this case. Sections 2 and 3 of the Act provide in part:

> The Congress finds that --
>
> * * *
>
> (2) the decision of the Supreme Court in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections;
>
> * * *
>
> The purposes of this Act are --
>
> * * *
>
> (2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989);

Similarly, §105(a) of the Act provides "the concept of 'alternative business practice'" "shall be in accordance with the law as it existed on June 4, 1989," the day before the Court decided this case.

Sections 104 and 105 require the employer to carry the burdens of production and persuasion on job relatedness and business necessity. Section 105 relieves employees of the need to prove which practices cause disparate

---

[3] *See Landgraf v. USI Film Products*, No. 92-757, slip op. at 5 (U.S. April 26, 1994).

impact, where "the elements of [the employer's] decision making process are not capable of separation for analysis. . . ."

However, §402(b) purports to exempt from the benefits of the Act "any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983." While the literal language of §402(b) makes it inapplicable here (*see* p. 13, *infra*,) the Congressional debates show it was designed to apply to only one case -- namely, this one.

Senator Murkowski, §402(b)'s staunchest supporter, placed in the record two letters which "clearly outline [his] intentions." 137 Cong. Rec. S15953 (daily ed. Nov. 5, 1991). Both say,

> To the best of my knowledge, *Wards Cove Packing v. Atonio* is the only case within this provision.

137 Cong. Rec. S15953-15954 (daily ed. Nov. 5, 1991). Senator Kennedy described §402(b) as one "which only keeps the bill from applying to the parties in the *Wards Cove* case itself . . ." 137 Cong. Rec. S15963 (daily ed. Nov. 5, 1991). Senator Simon denounced it as "an exemption for one company." 137 Cong. Rec. S15967 (daily ed. Nov. 5, 1991).

When the *Washington Post* divulged the employers had paid a lobbyist $175,000.00 to obtain §402(b) (137 Cong. Rec. H9555 (daily ed. Nov. 7, 1991) (quoting story)), outrage erupted. Senator Adams said, "This little

amendment represents special interest legislating at its worst." Senator Akaka said:

> . . . It is an extremely cruel irony that the plaintiffs in *Wards Cove versus Atonio*, the very case which we seek to overturn in this Act, would be *the only American workers deprived* of having the merits of their claim considered under the *Griggs* standard.

137 Cong. Rec. S15950 (daily ed. Nov. 5, 1991). (Emphasis added.) Representative McDermott said, "Someone has brought a skunk into the garden. You can find it in section 402(b)." 137 Cong. Rec. H 9506 (daily ed. Nov. 7, 1991). Representative Faleomavaega said, "Fair is fair and this kind of lawmaking stinks." 137 Cong. Rec. H9555 (daily ed. Nov. 7, 1991).

The only apparent justifications for §402(b) are it was inserted "[a]t the request of the Senators from Alaska" (137 Cong. Rec. S15478 (daily ed. Oct. 30, 1991)), "Wards Cover [*sic*] Packing . . . has spent over 20 years and $2 million in legal fees proving itself innocent . . . " (137 Cong. Rec. S15493 (daily ed. Oct. 30, 1991)) and "a deal is a deal" (137 Cong. Rec. S15966 (daily ed. Nov. 5, 1991)). *See also* 137 Cong. Rec. S15953-54, S15963, S15966 (daily ed. Nov. 5, 1991); 137 Cong. Rec. H9509 (Nov. 7, 1991).

5. The Court of Appeals Decision.

The Court of Appeals assumed without deciding §§104 and 105 of the Act apply to pending cases. Because there were 16 interlocutory decisions in this case before

October 30, 1983, the employees argued this case falls outside the literal language of the exemption, but the Court of Appeals disagreed. It held §402(b) did not violate separation of powers, because it amends prior law without mandating a particular result. Similarly, it held §402(b) was not amenable to strict or heightened scrutiny and it satisfied the rational basis test. It also held §402(b) did not implicate the bill of attainder clause.

The Court of Appeals refused to credit the employees' industry statistics, largely because they were not differentiated by qualifications. It refused to accept a concession by the employers' expert of statistically significant under-representation of non-whites in certain jobs as a showing of disparate impact, because the employees did not establish which practices caused the disparities.

The Court of Appeals observed the district court had failed to determine whether the objective job qualifications the employers suggested at trial had been actually applied, although it had directed the district court to do so on a prior appeal. But it held the failure did not justify remand on this issue, because there was no evidence to link any bottom line disparity with use of subjective criteria.

The Court of Appeals also affirmed dismissal of the employees' nepotism and messing claims.

However, the Court of Appeals held the existence of separate hiring channels, race-labelling and segregated housing were established. It remanded for a determination of whether separate hiring channels and race-labelling had a disparate impact. It also remanded for a determination

of whether reassigning bunkhouses at the start of the canning season was a feasible alternative to segregated assignments.

REASONS FOR GRANTING THE WRIT

1.
Whether the Act's Provisions Governing Burden of Proof and Evidence of Causality in Disparate Impact Cases Apply to Pending Cases is an Important Question Which the Court Should Decide

Whether the Act's provisions governing burden of proof and evidence of causality in disparate impact cases apply to pending cases is an important question which the Court should decide.

The Court held recently §§101 and 102 of the Act do not apply to cases pending at the time of enactment, but observed, "[T]here is no special reason to think that all the diverse provisions of the Act must be treated uniformly for . . . purposes" of application to pending cases. *Landgraf v. USI Film Products*, No 92-757, slip op. at 17 (U.S. April 26, 1994). The Court held prospective application is the default rule for changes in "substantive rights, liabilities or duties." *Landgraf*, slip op. at 17. But it identified application to pending cases as the default rule for procedural changes. *Landgraf*, slip op. at 14-15; *see also id* at 15 ("The jury trial right . . . is plainly a procedural change of the sort that would ordinarily govern in trials conducted after its effective date.") The Court did not decide whether §§104 and 105 of the Act were procedural or applied to cases pending at the time of enactment.

Sections 104 and 105 of the Act are procedural for proposes of application to pending cases, because they create "[n]o new causes of action or substantive rights or liabilities," but simply "enumerate[ ] defenses" (*French v. Grove Manufacturing Co.*, 656 F.2d 295, 298 (9th Cir. 1981); *see also Lockley v. Deere and Co.*, 933 F.2d 1378, 1382 n.2 (9th Cir. 1991)), "relax[ ]" proof "requirement[s]" (*DeGurules v. I.N.S.*, 833 F.2d 861, 864 (9th Cir. 1987)) and define a *prima facie* case (*New England Power Co. v. United States*, 693 F.2d 239, 244-45 (1st Cir. 1982)); *but cf. Dick v. New York Life Insurance Co.*, 359 U.S. 437, 446 (1959) (burden of proof considered substantive for purposes of deciding whether state law applies in diversity cases).

The employees' disparate impact challenge to subjective practices has never been tested in an error-free trial. The district court refused to consider it at trial in 1982, because it believed subjective practices were not amenable to disparate impact analysis. The Court of Appeals reversed in a ruling which foreshadowed *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977 (1988). The Court reversed in turn, but on different grounds. On remand, the district court took no new evidence. Once again, it dismissed. Once again, the Court of Appeals reversed. So once again, the district court must consider the claims. But it should now do so under the standards which prevailed in 1982 and which have been reinstated by §§104 and 105 of the Act.

Unlike §101 of the Act, which "lacks any direct reference to cases arising before its enactment or to the date of the *Patterson [v. McLean Credit Union* 491 U.S. 164 (1989)] decision" (*Rivers v. Roadway Express, Inc.*, No.

92-938, slip op. at 5 (April 26, 1994)), §§2, 3 and 105 refer to *Griggs*, other early disparate impact cases and the date of the Court's earlier decision here. (*See* p. 10-11, *supra*.) This alone might well be insufficient to make a statute truly "retroactive." But applying changes in procedural rules to pending cases is not applying the changes retroactively.

> Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive.

Landgraf, slip op. at 15. The rules in §§104 and 105 governing burden of proof and evidence of causality clearly concern secondary conduct, not primary conduct.

2.
Because the Ruling Below Permits Congress to Prescribe a Different Rule of Decision for a Single Pending Case than for All Other Cases, it Conflicts with Decisions of the Court on Separation of Powers

The Court should grant certiorari to decide whether Congress violates separation of powers, when it prescribes a different rule for the decision of a single case than for all other cases.[4]

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[4] The Court of Appeals rejected the employees' statutory argument that the literal terms of §402(b) make it inapplicable here. (App., p. A-9 n.3; *see also*, p. 13,

Congress exempted this case from the Act solely to give the employers what it hoped would be a decisive edge in a pending lawsuit. The Court of Appeals wrote:

> The workers, with some justification, characterize section 402(b) as an attempt by Congress to legislate an end to this litigation.

(App., p. A-11.) Congress found the Court's decision in this case "weakened the scope and effectiveness" of Title VII. (*See* p. 11, *supra.*) It announced an intent "to codify the concepts of 'business necessity' and 'job related' . . . in . . . Supreme Court decisions prior" to the Court's decision here. (*Ibid.*) And it said "the concept of 'alternative business practice'" "shall be in accordance with the law as it existed on" the day before the Court's decision in this case. (*Ibid.*) Congress legislated for this case alone an interpretation of Title VII which it repudiated for all others. It was an interpretation which Congress believed to be incorrect.

"Congress . . . passe[s] the limit which separates the legislative from the judicial power," when it "prescribe[s] a rule for the decision of a cause in a particular way." *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146-47 (1871); *see also United States v. Sioux Nation of Indians*, 448 U.S. 371, 405 (1980). Congress may amend laws in a way which leaves courts free "to apply [their] ordinary rules to the new circumstances created by" the legislation. *Klein*, 80 U.S. at 146-47. But this entails enacting changes of general applicability.

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supra.)

> [I]f Congress does not purport to alter the governing procedural and substantive law, Congress cannot force its interpretation of that law upon the federal courts in particular cases.

L. Tribe, *American Constitutional Law* 50 (2nd ed. 1988). The §402(b) exemption here cannot pass muster under *Klein* because it leaves intact for a single case the "old circumstance" of law before the Act. For this case alone, Congress directed not "a change in law," but specific results under old law.

The Court of Appeals said it "was not convinced that section 402(b) presents a genuine *Klein* issue," apparently because it "does not purport to order any federal court to dismiss the workers' complaint, to enter judgment against them, *or to make particular findings of fact or conclusions of law.*" (App., p. A-11.) (Emphasis added.)

However, §402 (b) does steer certain findings and conclusions, as the Court of Appeals' opinion shows:

> *First,* even the employers' expert conceded statistically significant under-representation of non-whites in key jobs. Yet the Court of Appeals refused to accept this as a showing of disparate impact solely because it believed no evidence "link[ed] . . . that disparity to one or more specific employment practices." (App., p. A-26.) Under §105 of the Act, an employee need not separately show which practices cause an impact when "the elements of [an employer's] decision making process are not capable of separation for analysis."

42 U.S.C. §2000e-2(k)(1)(B)(i). Justice Stevens noted in dissent here, "[I]t is undisputed that [the employers] did not preserve . . . records" which would allow the employees to establish which practices caused disparities at the bottom line. 490 U.S. at 673. The requirement of causality exists here only because of the §402(b) exemption. (*See* App., p. A-26.)

Second, the Court of Appeals wrote,

> [W]e are acutely aware of the difficulty that the strict causation requirement adopted [by the Court] in *Wards Cove* creates for these plaintiffs in challenging subjective hiring criteria.

(App., p. A-27.) Yet it held the employees could not challenge use of subjective hiring criteria, because of the absence of "evidence to link any bottom line disparity to the use of subjective hiring criteria . . . ." (App., p. A-28 through A-29.) Similarly, the Court of Appeals rejected the employees' industry labor statistics, largely because they were not differentiated by qualifications. (App., p. A-24.) But given the regime of subjectivity in which white foremen recruit friends and relatives on the basis of shifting or indistinct job criteria (App., p. A-55 through A-58), it is hard to isolate the impact of subjective hiring criteria. Because it allows employees to show the cumulative effect of discriminatory practices at the bottom line, §105 of the Act permits employees to rely on statistics

undifferentiated by qualifications, when the qualifications are subject to attack. It thus eliminates the Court of Appeals' basis for rejecting industry-wide statistics. But for the §402(b) exemption, §105 of the Act would apply here.

Third, the Court of Appeals recognized the Court had "eased" the "standard for evaluating [an employer's] business justification" in its prior decision. (App., p. A-38.) Yet it endorsed the relaxed "business justification" defense for the three practices which the employees had shown or could on remand show had a disparate impact -- namely, separate hiring channels, segregated housing and race labelling. (App., p. A-37 through A-40.) But for the §402(b) exemption, the employers would have to bear the burden of production and persuasion on the stricter standard of "job related for the position in question and consistent with business necessity." 42 U.S.C. §2000e-2(k)(1)(A)(i).

The Court of Appeals acknowledged, "Congress was aware that it was imposing a burden on the workers when it enacted section 402(b)." (App., p. A-21.) Under *Klein*, such intent can be decisive. *See Klein*, 80 U.S. at 145 (statute violated separation of powers because it was "intend[ed] . . . as a means to an end" and "[i]ts great and controlling purpose" was to deny pardons the legal effect courts had given them); *see also Sioux Nation*, 448 U.S. at 404. What is clear above all from the debates is Congress wished in §402(b) to protect the employers here from the expense or risk of further litigation by making it easier for them to win.

The Court of Appeals held *Robertson v. Seattle Audubon Society,* 112 S.Ct. 1407, 1414 (1992), was "fatal to the workers' contention that Section 402(b) runs afoul of *Klein*," because it shows "[e]ven explicit references to pending cases" can "fail[ ] to present a separation of powers problem." (App., p. A-11 through A-12.) However, a separation of powers claim does not depend on the precise words Congress uses to single out a pending case. *Klein* invalidated a statute which did not mention any pending cases by name.

Robertson, in any event, declines "to address any broad question of Article III jurisprudence" or even whether the Court of Appeals' "reading of *Klein* is correct." 112 S.Ct. at 1414. It, in fact, declines to address an issue central to the employees' claim here:

> Respondents' *amicus* Public Citizen . . . contends that even a change in law, prospectively applied, would be unconstitutional if the change swept no more broadly, or little more broadly, than the range of applications at issue in the pending cases. This alternative theory was neither raised below nor squarely considered by the Court of Appeals nor advanced by respondents in this Court. Accordingly, we decline to address it here.

112 S.Ct. at 1415.

Because of the importance of the separation of powers question, the Court should hear this case. Congress has never before granted a special exemption to a civil

rights law. Occasions on which it has singled out pending cases have been rare. By their nature, separation of powers questions implicate basic constitutional concerns. *See Freytag v. C.I.R.*, 111 S.Ct. 2631, 2634 (1991) (separation of powers is "the central guarantee of a just government"); *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (separation of powers "is essential to the preservation of liberty"); *Morrison v. Olson*, 487 U.S. 654, 693 (1988) ("Time and again we have reaffirmed the importance in our constitutional scheme of the separation of powers into the three coordinate branches.")

3.
Because the Ruling Below Permits Congress to Impose on a Single Case an Interpretation of Title VII Which it Believed to be Incorrect, it Conflicts with this Court's Rulings on Equal Protection

The §402(b) exemption violates equal protection by singling out for only one case an interpretation of Title VII which Congress believed to be wrong.

The Court of Appeals acknowledged the §402(b) exemption "does injure to a degree the due process and equal protection interests of the workers." (App., p. A-13.) But it held the injury did not "amount[ ] to a constitutional violation." (*Ibid.*) The Court of Appeals observed, "There is something jarring about legislation aimed at an individual target." (App., p. A-15.) It conceded, "Congress' primary concern . . . was to relieve the canneries from the cost of additional litigation." (App., p. A-21.) Yet it upheld the §402(b) exemption against an equal protection challenge, because it believed the government's "after-the-fact explanation for" §402(b) was "rational." (App., p. A-14.)

Under equal protection principles, "the state must govern impartially" (*New York Transit Authority v. Beazer*, 440 U.S. 568, 587 (1979); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976)) and "all persons similarly situated should be treated alike" (*City of Cleburne v. Cleburne Living Centers, Inc.*, 473 U.S. 432, 439 (1985)). "The sovereign may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective." *Lehr v. Robinson*, 463 U.S. 248, 265 (1983). While the Fifth Amendment does not contain an express guarantee of equal protection, one is nevertheless implicit in its due process clause. *E.g., Hampton*, 426 U.S. at 100; *Bolling v. Sharpe*, 347 U.S. 497 (1954).

Whatever test is used, a statute can survive an equal protection challenge only if it is anchored in *governmental* rather than purely private interests. *See, e.g., U.S. Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) ("legitimate *governmental* interests" must be served under rational relationship test); *Cleburne*, 473 U.S. at 442 ("compelling *governmental* interests" must be served under strict scrutiny test); *J.E.B. v. Alabama ex rel. T.B.*, 62 U.S.L.W. 4219, 4222 n.6 (U.S. April 19, 1994). ("important *governmental* objective" must be served under heightened scrutiny test). (Emphasis added.) However, no *governmental* interest is served by imposing on just one case an interpretation of Title VII which Congress clearly believed was wrong. All §402(b) does is serve the nakedly private interest of affording the employers here an edge in an ongoing lawsuit.

Assuming the §402(b) exemption served a governmental end, it would still violate equal protection, because

the means it uses is not adapted to achieving the end. Even the "rational relationship" test requires both a "legitimate" governmental end and a means which is "rationally related" to it. *Metropolitan Life Insurance v. Ward*, 470 U.S. 860, 881 (1985). Equal protection imposes "a requirement of some rationality in the nature of the class singled out." *Rinaldi v. Yeager*, 384 U.S. 305, 308-309 (1966). While "legislation may impose special burdens upon defined classes in order to achieve permissible ends," "the distinctions that are drawn" must "have 'some relevance to the purpose for which the classification is made.'" *Ibid.*, *quoting Baxstrom v. Herold*, 383 U.S. 107, 111 (1966).

Section 402(b) does not serve the finality of the Court's rulings or comity among branches of government, for of the eight cases the Act modifies or overrules (*see* p. 10 and n.3, *supra*), five were remanded for further proceedings.[5] Of the five, only this case was excluded from the benefits of the Act. Nor does §402(b) serve any broad interest in ending prolonged litigation, for coverage does not depend simply on when the case was filed, but on a ragged gerrymandering of filing and decision dates.

While §402(b) fails to meet even the rational relationship test, a more stringent test should apply. Section §402(b) is conspicuously racial in scope, because it was designed to place a class of non-white litigants at a disadvantage. Consequently, the strict scrutiny test should

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[5] 490 U.S. at 661; *Patterson v. McLean Credit Union*, 491 U.S. 164, 189 (1989); *Martin v. Wilks*, 490 U.S. 755, 769 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989); *Library of Congress v. Shaw*, 478 U.S. 310, 323 (1986).

apply. *See Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 471 (1982). That the exemption covers only a small fraction of non-white litigants is not critical. *See Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960) ("When a legislature . . . singles out a *readily isolated segment of a racial minority* for special discriminatory treatment, it violates the Fifteenth Amendment.") (emphasis added); *Mathews v. Lucas*, 427 U.S. 495, 504-505 n.11 (1976) ("That the statutory classifications challenged here discriminate among illegitimate children does not, of course, mean that they are not also properly described as discriminating between legitimate and illegitimate children.")

Alternatively, the heightened scrutiny test should apply. While the "rational relation" test is best suited for ordinary "social or economic" legislation (*see Cleburne*, 473 U.S. at 440), anti-discrimination laws reflect a high priority "national policy to prohibit racial segregation and discrimination." *Bob Jones University v. United States*, 461 U.S. 574, 593 (1983). This justifies a higher level of scrutiny here.

Since it makes proof more stringent for the class here than for other litigants, §402(b) in effect creates a presumption that Wards and Castle are entitled to special leniency. When, as here, a "statute [creates a presumption which] bristles with severities that touch the plaintiff alone," equal protection requires "'some rational connection between the fact proved and the ultimate fact presumed.'" *McFarland v. American Sugar Co.*, 241 U.S. 79, 86 (1916), *quoting Mobile Jackson and Kansas City R.R. v. Turnipseed*, 219 U.S. 35, 43 (1910). Here, there is none.

CONCLUSION

The Court should grant the petition for writ of certiorari.

DATED: April 29, 1994.

Respectfully submitted,

Abraham A. Arditi
Attorney for Petitioners

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Frank Atonio; Alan Lew; Curtis Lew; Eugene Bacliq; Joaquin Arruiza: Randy Del Fierro; Barbara Viernes; Clarke Kido; Lester Kuramoto; Margaret Baclig, *Plaintiffs-Appellants,* v. Wards Cove Packing Company, Inc., a foreign corporation; Bumble Bee SeaFoods, Inc., a domestic corporation; Columbia Wards Fisheries, *Defendants-Appellees,* and United States of America, *Intervenor.*	No. 91-35306/35861 D.C. No. CV-74-00145 JLQ OPINION

Appeal from the United States District Court
for the Western District of Washington
Justin L. Quackenbush, District Judge, Presiding

Argued and Submitted
September 17, 1992 -- Seattle, Washington

Filed December 7, 1993

Before: Eugene A. Wright, Betty B. Fletcher
and William C. Canby, Jr., Circuit Judges.

Opinion by Judge Canby

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COUNSEL

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Beatrix W. Shear, Riker, Danzig, Scherer, Hyland & Perretti, Morristown, New Jersey; Stephen C. Chin, Wilmer, Cutler & Pickering, Washington, D.C., and Douglas S. McDowell, McGuiness & Williams, Washington, D.C. for amici.

OPINION

CANBY, Circuit Judge:

Salmon cannery workers appeal from the district court's judgment dismissing with prejudice their claims of racial discrimination in employment. The defendants are three former employers. We ordered supplemental briefing on the question whether Title I of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1071-81 (codified in scattered sections of 42 U.S.C.A.), applies to this case. We conclude that one of the provisions of the Act validly exempts this case from the Act's substantive provisions. Applying the earlier law, as well as the prior mandates of the Supreme Court and this court, we affirm in part, reverse in part, and remand for further proceedings.

I

This case has a long and complex history, of which only a small portion is relevant to this appeal. In 1974, nonwhite cannery workers brought an action in the United States District Court for the Western District of Washington to challenge employment policies and conditions at several canneries located in remote areas of Alaska. The complaint included claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e-2000e(17) (1988 & Supp. III 1991).

The workers sought relief on their Title VII claims on theories of disparate treatment and disparate impact. They contended that their employers had confined them to relatively low-paying jobs, primarily cannery line

positions. They asserted that job discrimination at the canneries appeared in many forms, two of which were the nepotistic hiring of whites for better-paying jobs and repeated failures to inform non-whites of openings for those jobs. The workers also complained that housing and messing facilities at the canneries were segregated routinely between whites and nonwhites, and that the employers engaged in or tolerated a system of race-labelling.

The district court rejected the workers' claims after a bench trial. First, it considered and rejected all of the workers' claims of disparate treatment. That ruling of the district court was left intact on a prior appeal, and the disparate treatment claims are no longer in issue.[1]

The district court next concluded that the workers had failed to make out a prima facie case of disparate impact in hiring or promotion. It found the workers'

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[1] The district court determined that a combination of employment practices raised an inference of disparate treatment in hiring and promotion, but ultimately found that the canneries had not intended to discriminate against nonwhites. The workers challenged this determination in their first appeal, but we rejected their challenge in an opinion that was later withdrawn. *See Atonio v. Wards Cove Packing Co.*, 768 F.2d 1120, 1125-30 (9th Cir.) (*Atonio I*), *withdrawn, reh'g en banc granted*, 787 F.2d 462 (9th Cir. 1985). On remand of the case from the Supreme Court, the workers urged the district court to reconsider their disparate treatment arguments. The district court refused, and the workers have not asked us to review that decision. Accordingly, only the disparate impact claims are before us on this appeal.

comparative statistics to be unreliable, and accepted the employers' evidence that no nepotistic hiring preference existed for whites in upper-level jobs. The court declined to consider the potential impact that subjective criteria, including impressions of experience and attitude, might have had on the canneries' hiring decisions. It further found that no impact on the workers had resulted from the housing and messing arrangements at the canneries.

A panel of this court affirmed the district court's judgment, but its opinion was withdrawn pending an en banc resolution of the subjective criteria issue. *Atonio v. Wards Cove Packing Co.*, 768 F.2d 1120 (9th Cir.) (*Atonio I*), *withdrawn, rehearing en banc granted*, 787 F.2d 462 (9th Cir. 1985). The en banc court held that disparate-impact analysis could be applied to subjective hiring criteria. *See Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1482 (9th cir. 1987) (en banc).

After the en banc decision, the original three-judge panel resumed control of the case and vacated the district court's judgment for the employers. *Atonio v. Wards Cove Packing Co.*, 827 F.2d 439 (9th Cir. 1987) (*Atonio II*), *rev'd*, 490 U.S. 642 (1989). The panel ruled that the workers' comparative statistics established a prima facie case of disparate impact in hiring and promotion. Those comparative statistics showed a much higher concentration of nonwhite employees in the cannery jobs than in the "at-issue" jobs outside the canneries. The panel accordingly ordered the case to be remanded and instructed the district court to evaluate the business necessity of practices which had yielded the disparity in proportions of non-whites in cannery and non-cannery "at-issue" jobs. *Atonio II*, 827 F.2d at 444-45. The panel was also concerned that

the district court had given inadequate attention to allegations of nepotism, and it accordingly ordered the district court to reexamine that issue. *See id.* at 445. The panel also instructed the district court to consider whether race-labelling,[2] separate hiring channels (including word-of-mouth recruitment among whites for upper-level jobs), subjective decision making, or segregated housing and messing individually created a disparate impact on the workers. *Id.* at 445-49.

The remand did not take place at that point, because the Supreme Court granted review and reversed. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 655 (1989). Although the court confirmed that subjective criteria are amenable to impact analysis, *see id.* at 648, it held that the comparative statistics on which *Atonio II* relied were incapable of establishing a prima facie impact case. *Id.* at 650-55. The Court held that the proper comparison is not between the racial composition of the cannery work force and the "at-issue" work force, but rather between the racial composition of the labor market for at-issue jobs and the racial composition of the at-issue work force. *Id.* at 650-51. Otherwise, an employer whose hiring practices for noncannery "at-issue" jobs had no discriminatory impact could be penalized for having hired a high percentage of nonwhite workers for the cannery jobs. *See id.* at 654. The Court accordingly reversed and remanded for further proceedings to determine whether the workers could succeed in maintaining their claim under a proper impact analysis. *Id.* at 655.

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[2] "Race labelling" refers to the practice of denominating groups of workers, and the facilities they use, by racial terms.

The Supreme Court also addressed two other challenges to this court's method of dealing with specific employment practices in *Atonio II*. The Court said that where plaintiffs allege that more than one practice has created an adverse impact on minority hiring or promotion, the plaintiffs must "demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking here, specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites." *Id.* at 657. The Court also rejected a strict characterization of the "business necessity" defense, holding that "the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." *Id.* at 659. The plaintiffs were to bear the burden of persuasion to disprove the existence of a business justification. *See id.* at 659-60.

The Supreme Court remanded the case to this court, and we in turn remanded it to the district court. The district court examined its prior decision and concluded that none of the specific employment practices that the workers identified had created an adverse impact. The court again found that the outward appearance of nepotism among upper-level employees had no substantive basis; the employees had not been hired because of their relationships. The court further held that plaintiffs had failed to present a prima facie case on the basis of separate hiring channels, or subjective decision making. It also held that the workers had not made a prima facie impact case of segregated housing or messing, and that, in any event, there were sufficient business justifications for the employers' housing and messing practices. The workers

once again appealed.

Ten months after the district court dismissed this case, but before this appeal was argued, Congress enacted the Civil Rights Act of 1991. The Act significantly modifies the rules that the Supreme Court announced in *Wards Cove*. For example, the Act permits a plaintiff to challenge an employer's "decisionmaking process" as one employment practice causing a disparate impact, upon a showing that the elements of that process are inseparable for analysis. 42 U.S.C. § 2000e-2(k)(1)(B)(i) (Supp. III 1991). In addition, it restates the business necessity defense and places on the employer the burden of proving that a practice causing a disparate impact is "job related for the position in question and consistent with business necessity." *See id* § 2000e-2(k)(1)(A)(i). Nothing in the 1991 Act, however, modifies the central holding of *Wards Cove* that a disparate impact case cannot be established on the basis of a statistical disparity between the cannery work force and the noncannery "at-issue" jobs.

The 1991 Act also contains an unusual provision. Section 402(b) of the Act states:

> CERTAIN DISPARATE IMPACT CASES.-- Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.

105 Stat. at 1099, *reprinted in* 42 U.S.C. § 1981 at 717 (Supp. III 1991). The case before us is the only one that appears to meet the criteria prescribed by section 402(b)

for exemption from the statute.[3] The workers ask us to apply the general provisions of the Act to their case, which was pending when the Act was passed, and to reject as unconstitutional the exemption set forth in section 402(b). They also urge various errors in the district court's decision on remand. We have jurisdiction over their appeal under 28 U.S.C. § 1291.

II

We deal first with the question of the applicability of the 1991 Act to this case. The canneries argue that we need not reach the question of the validity of section 402(b) because the entire Act is prospective, applying only to cases filed after the date of its enactment, November 21, 1991. If the Act is without retroactive effect, the workers cannot benefit from it in any event, and section 402(b) becomes superfluous.

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[3] The workers contend that because this court rendered a decision on an interlocutory appeal prior to entry of the original judgment in the district court, section 402(b) does not apply to this case. *See Atonio v. Wards Cove Packing Co.*, 703 F.2d 329, 332 (9th Cir. 1982) (affirming the dismissal of a defendant named in the complaint because the claims against it were time-barred). We decline to read section 402(b) so narrowly. The legislative history, although ambiguous in other respects, makes clear that Congress had this case in mind when it enacted the exemption provision. *See, e.g.*, 137 Cong. Rec H9505, 9506 (daily ed. Nov. 7, 1991) (statement of Rep. Wheat) ("[t]hose are the words that exempt one case, *Wards Cove Packing Co. v. Atonio*, from everything in this bill").

The question of the retroactivity of the Act is not an easy one, and it will be some months before it is definitively settled. The Supreme Court has granted review in two cases that raise the issue, *Harvis v. Roadway Express, Inc.*, 973 F.2d 490 (6th Cir. 1992), *cert. granted, in part*, 113 S.Ct. 1250 (1993) (No. 92-938), and *Landgraf v. USI Filon Products*, 968 F.2d 427 (5th Cir. 1992) *cert. granted, in part*, 113 S.Ct. 1250 (1993) (No. 920757), but no decision has been announced. In the meantime, this court, unlike some other circuits,[4] has held the Act to be retroactive. *Estate of Reynolds v. Martin*, 985 F.2d 470, 471 (9th Cir.) *reh'g en banc denied*, 994 F.2d 690 (9th Cir. 1993). In light of that fact, and of our conclusion that this appeal can be resolved without further delay by treating the Act as retroactive, we do so. We therefore reach the question of the constitutionality of the exemption set forth in section 402(b).

A

The workers present three arguments to support their position that section 402(b) is unconstitutional. First, they contend that the provision violates the separation of powers. Next, they argue that it denies their rights to due process and equal protection. Finally, the maintain that it amounts to a bill of attainder. We address each argument in turn.

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[4] *E.g., Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370 (11th Cir. 1992); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992); *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 86 (1992).

The workers, with some justification, characterize section 402(b) as an attempt by Congress to legislate an end to this litigation. The attempt, they contend, runs afoul of Article III of the Constitution. Their contention relies upon the well-known dictum contained in *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1872), which questioned Congress' power to "prescribe rules of decision to the judicial department of the government in cases pending before it."

[1] We are not convinced that section 402(b) presents a genuine *Klein* issue. The provision does not purport to order any federal court to dismiss the workers' complaint, to enter judgment against them, or to make particular findings of fact or conclusions of law. Indeed, the judiciary remains free to decide this case and every issue in it by the same principles and law that prevailed prior to the passage of the 1991 Act.

In any event, the recent decision of the Supreme Court in *Robertson v. Seattle Audubon Soc.*, 112 S. Ct. 1407 (1992), is fatal to the workers' contention that section 402(b) runs afoul of *Klein*. *Robertson* was a consolidation of two action brought by Audubon Societies to challenge timber cutting in areas allegedly inhabited by spotted owls, a threatened species under the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1988 & Supp. III 1991). The complaints alleged violations of several federal statutes. While the litigation was pending, Congress enacted the so-called Northwest Timber Compromise, as an amendment to an appropriations act. The amendment set forth a compromise plan for timber harvesting, and provided:

> [M]anagement of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned *Seattle Audubon Society et al. v. F. Dale Robertson*, . . . and *Washington Contract Loggers Assoc. et al., v. F. Dale Robertson*, . . . and the case *Portland Audubon Society et al., v. Manuel Lujan, Jr.*, . . .

Department of the Interior and Related Agencies Appropriations Act, §318(b)(6)(A), Pub.L. No. 101-121, 103 Stat. 701, 747 (1990). The effect of this provision was to eliminate, by temporary amendment to the environmental laws, the primary statutory support for the Audubon Societies' claims. The Audubon Societies challenged this provision as a congressional interference with judicial powers conferred by Article III of the Constitution. *Robertson*, 112 S. Ct. at 1412. The Supreme Court rejected the societies' challenge, holding that the quoted provision constituted a permissible change in the law, rather than a legislative direction of the result in pending litigation under existing law. *Id.* at 1413-14. Even explicit references to pending cases, the Court indicated, failed to present a separation of powers problem. *See id.* at 1414.

[2] If the amendment in *Robertson* avoided separation of powers pitfalls, section 402(b) clearly does so as well, for it represents far less of an interference with the judiciary. Section 402(b) does not determine that a particular employment practice or business justification

either satisfies or violates the requirements of Title VII. It leaves the courts free to determine the outcome of this litigation with all the latitude they would have had if the 1991 Act had never been passed.

2

[3] Although section 402(b) does not violate the separation of powers, it does injure to a degree the due process and equal protection interests of the workers. The provision withholds from the plaintiffs of a single Title VII case benefits arising from a new law that is perceived to be favorable to Title VII plaintiffs. We must consider whether the infliction of these injuries amounts to a constitutional violation.

The workers urge us to apply heightened or strict scrutiny in making this determination. They assert that any more lenient standard is improper because section 402(b), while neutral on its face, in effect classifies Title VII plaintiffs on the basis of race. The canneries, and the United States as an intervening party, respond that the provision merely distinguishes among individual cases.

[4] The language and effect of section 402(b) support the canneries' and the Government's interpretation. The provision is indeed targeted at a particular case, and not at a racial class or other category subject to special constitutional protection. Although section 402(b) does withhold the benefits of the Act from the plaintiffs in this case, it leaves other claimants of the same racial or ethnic groups free to invoke the act in other cases. It is not possible to identify any racial classification by which Congress has differentiated these Title VII plaintiffs from

others that are entitled to the benefits of the 1991 Act. Nor has Congress singled out Title VII plaintiffs as a class and imposed special disabilities on them. This case therefore differs from such cases as *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), in which the Supreme Court invalidated a statewide initiative that banned school bussing for segregation but that permitted bussing for other purposes. Finding no suspect classification, we conclude that section 402(b) need satisfy only the rational basis test to survive the workers' constitutional challenge.

To pass muster under the rational basis test, a challenged statute or regulation must be "rationally related to a legitimate government interest." *Lyng v. International Union, UAW*, 485 U.S. 360, 370 (1988) (internal citation omitted). The parties vigorously dispute whether a legitimate government interest underlies the provision at issue in this case.

The United States offers a rational after-the-fact explanation for Congress' enactment of section 402(b). Congress was aware, argues the Government, that this case has consumed enormous time and resources on both sides. Congress was also aware, the Government contends, that the Supreme Court's decision provided clear-cut legal standards with which to resolve the matter. "Congress could rationally conclude under these circumstances," the Government asserts, "that, although it wished to enact new statutory provisions, it did not wish to retroactively inject them into this lawsuit."

The workers, who offer statements of Members of Congress from the period when the Act was under

consideration, impliedly ask us to reject the proffered rationale as a pretext. The statements indicate that several Members were troubled by the apparent unfairness of the provision. Moreover, a few Members acknowledged that section 402(b) was a product of special-interest lobbying. *See, e.g.*, 137 Cong. Rec. H9516 (daily ed. Nov. 7, 1991) (statement of Rep. Moran)(calling section 402(b) the results of a "political deal cut in the Senate.")

The relevance of these statements to our analysis, however, is marginal. A rational basis need not be one that actually motivated Congress. *See Flemming v. Nestor*, 363 U.S. 603, 612 (1960). It is enough that plausible reasons for Congress' action exist. *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980). Under the minimum standard of rationality, the reason proffered by the Government qualifies as plausible and sufficient.[5]

It is true that there is something jarring about legislation that is aimed at an individual target. The Supreme Court responded to that notion in *Morey v. Doud*, 354 U.S. 457 (1957), which invalidated on equal protection grounds an Illinois statute that exempted the American Express Company by name from requirements that the statute imposed on other firms that sold money orders. Less than twenty years later, however, the Supreme Court overruled *Morey*. *See City of New Orleans v. Dukes*,

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[5] We also find nothing in the record that would permit a conclusion that Congress' only purpose was to harm a politically unpopular group. *See United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973) (invalidating statutory provision intended to prevent "hippies" from participating in food stamp program).

427 U.S. 297, 306 (1976) (calling *Morey* "a needlessly intrusive judicial infringement on the State's legislative powers"). Under the philosophy of *Dukes*, we generally lack authority to invalidate a public law under the rational basis test merely because that law narrowly targets one or a few individuals. *Cf. Central States, Southeast & Southwest Areas Pension Fund v. Lady Baltimore Foods, Inc.*, 960 F.2d 1339 (7th Cir.) (rejecting equal protection challenge to an amendment voiding a single firm's withdrawal liability under the Multiemployer Plan Amendments to ERISA (the federal pension law), 29 U.S.C. 1381-1453 (1988 & Supp. III 1991), *cert. denied*, 113 S.Ct. 179 (1992)).[6]

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[6] In *Central States*, an employer withdrew from a multiemployer retirement fund after the effective date of the Multiemployer Pension Plan Amendments to ERISA. A pension fund sued the employer for withdrawal liability under the statute. The employer obtained from Congress an amendment to ERISA, tailored to it alone, voiding its withdrawal liability. *Central States.*, 960 F.2d 1340-42.

Upon an equal protection challenge to the amendment, the Seventh Circuit observed:

> To say that Congress cannot honor an equitable claim for exemption from a harsh law merely because it is the claim of only one firm -- that a federal statute cannot have only one beneficiary -- would be tantamount to ruling private bills unconstitutional, a step that we are naturally reluctant to take . . . .

Id. at 1344. Applying the rational basis test, *see id.* at 1343, the court found the amendment constitutional. *See id.* at

The workers cite a recent case which outwardly seems to resurrect the rule of *Morey*. In *News America Pub., Inc. v. FCC*, 844 F.2d 800 (D.C. Cir. 1988), a court of appeals invalidated the so-called Hollings Amendment, which in part barred the Federal Communications Commission from using its 1988 appropriation to extend waivers of newspaper-broadcast cross ownership rules. *See id.* at 802. The plaintiff in the case was the only holder of such a waiver. "Nowhere are the protections of the Equal Protection Clause more critical," said the D.C. Circuit, "than when legislation singles out one or a few for uniquely disfavored treatment." *Id.* at 813.

News America, however, was not decided under a rational basis standard of review. The decision was founded as much in First Amendment concerns as it was in equal protection; the court said that more than "'minimum rationality'" would have been necessary to save the Amendment. *Id.* at 814. The court relied on precedents drawn almost exclusively from the field of broadcast regulation, where heightened scrutiny of even non-content-based regulation is common. *See, e.g., id.* at 813 (citing *Community-Service Broadcast of Mid-America, Inc. v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978)(en banc)).[7] We do not

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1347.

[7] The D.C. Circuit in *Community-Service Broadcasting* observed:

> . . . where noncontent-based distinctions are drawn in a statute affecting First Amendment rights, the Supreme Court has held that the government interest must be "substantial" and the statutory classification "narrowly tailored" to serve that

view News America as applicable to our case, nor do we accept it as casting doubt on the Supreme Court's view that "mere underinclusiveness is not fatal to the validity of a law under the equal protection component of the Fifth Amendment, . . . even if the law disadvantages an individual or identifiable members of a group." *Nixon v. Administrator of Gen'l Servs.*, 433 U.S. 425, 471 n.33 (1977).[8]

[5] We conclude that section 402(b) does not

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interest if the statute is to withstand equal protection scrutiny.

Community-Service Broadcasting, 593 F.2d at 1122.

[8] We also view as inapplicable the line of cases, relied upon by the workers, in which the Supreme Court has struck down discriminatory state tax provisions for lack of a rational basis. *See, e.g., Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985)(invalidating property tax exemption for certain resident veterans); *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336 (1989)(finding equal protection violation where tax assessor valued land only upon its transfer, where state law required uniform property taxes). The state tax cases may genuinely be viewed as sui generis; it is an area where the Supreme Court has remained active long after ceasing to invalidate other economic legislation on equal protection grounds. *See Central States*, 960 F.2d at 1343 (7th Cir. 1992) ("[t]he Supreme Court continues to invalidate discriminatory state taxes," but persons challenging other economic regulation for lack of rational basis face "extraordinary and perhaps insuperable burden").

violate the equal protection component of the Fifth Amendment.

3

The workers' *amici* contend that section 402(b) is an unlawful bill of attainder under Article I, section 9, clause 3 of the Constitution. A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Administrator of Gen'l Servs.*, 433 U.S. at 468. A given statute must satisfy three requirements to meet this definition: "specification of the affected persons, punishment, and lack of judicial trial." *Selective Serv. Sys. v. Minnesota Pub. Int. Research Group*, 468 U.S. 841, 847 (1984). Section 402(b) falls short of the recognized threshold.

It is clear that section 402(b) meets the specificity requirement. A statute need not identify individuals by name to incur suspicion. A law that defines a class of persons on the basis of "irreversible acts committed by them" is adequately specific. *Id.* at 847-48 (discussing *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867) and *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1867)).[9] The statute

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[9] The Supreme Court in *Cummings* struck down a provision of Missouri's Reconstruction Constitution which barred persons from certain professions unless they swore under oath that they had not aided the Confederacy. *See Cummings*, 71 U.S. (4 Wall.) at 279. *Garland*, decided the same day as *Cummings*, invalidated a federal statute requiring a similar loyalty oath from attorneys as a condition for admission to practice before the federal

in this case defines a class composed solely of these plaintiffs on the basis of their having brought this action against the canneries.

Specificity alone, however, is not enough to implicate the attainder clause. This court recently cautioned that "[a]n otherwise valid law is not transformed into a bill of attainder merely because it regulates conduct on the part of designated individuals or classes of individuals." *Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723, 727 (9th Cir. 1992). If an otherwise valid law were so transformed, the ban on bills of attainder would be difficult to distinguish from the guarantee of equal protection. *See id.*

Therefore, the element of punishment remains essential. A statute inflicts forbidden punishment when it: (1) falls within the historical meaning of legislative punishment; (2) furthers no nonpunitive legislative goals; and (3) evinces Congress' intent to punish, as reflected in the legislative record. *Selective Service*, 468 U.S. at 852. Section 402(b) satisfies none of the three punishment criteria.

From a historical standpoint, the Supreme Court's broad reading of the term "punishment" has never been extended to the degree the workers seek. Aside from expected examples such as death, imprisonment, fines, or confiscation, the concept usually has been confined to bans on entry into a particular profession or business. *See* Lawrence H. Tribe, *American Constitutional Law* 10-5, p. 651 (2d ed. 1988). Broader readings, similar to the one

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courts. *See Garland*, 71 U.S. (4 Wall.) at 377.

presented here, have failed to persuade the Supreme Court. In the *Selective Service* case, for example, the Court said that college students who refused to register with the Selective Service suffered no punishment when they were refused financial aid pursuant to an Act of Congress. *Selective Service*, 468 U.S. at 852-56.

In this case Congress was aware that it was imposing a burden on the workers when it enacted section 402(b). Nothing in the record suggests, however, that Congress intended to punish the workers for filing and maintaining this action. Rather, it appears that Congress' primary concern, or at least the concern of the Members who offered the amendment, was to relieve the canneries from the cost of additional litigation. That concern may have been a product of special interest lobbying, but it was nevertheless a permissible legislative end. Cf. *Central States*, 960 F.2d at 1342 ("[m]uch modern legislation involves targeting government largesse on politically influential groups and the burdens of government on politically impotent ones").

Finally, section 402(b) does not purport to impose a punishment without judicial trial. We conclude that section 402(b) does not constitute a bill of attainder.

B

In sum, section 402(b) amends prior law without mandating a particular result, thereby avoiding separation of powers problems. The provision is not amenable to strict or intermediate scrutiny for purposes of due process or equal protection, and it satisfies the rational basis test. Nor is the provision a bill of attainder. We conclude,

therefore, that section 402(b) of the Civil Rights Act of 1991 is constitutional as applied in this case. We proceed, then, to address the workers' contentions without regard to the 1991 Act.

III

The Supreme Court reversed *Atonio II* on the specific issue of the use of comparative statistics, and articulated general rules governing disparate impact claims under Title VII. The Supreme Court's decision imposed the following requirements on the workers for them to prevail on their disparate impact claims: first, they must show that a specific employment practice has caused a significant disparate impact on employment opportunities for nonwhites in the at-issue jobs. *Wards Cove,* 490 U.S. at 657. If they succeed in doing so, and the employer offers a business justification for the practice, the workers must then either meet the burden of persuasion in disproving the existence of a business justification for an identified impact, *id.* at 659-60, or propose equally effective alternatives to the challenged practice. *Id.* at 661.

B

The record before us reveals that most of the workers' claims fail to make out prima facie cases of disparate impact under the requirements of *Wards Cove.* The workers assert, among other things, that the canneries routinely hire relatives, rely upon subjective hiring criteria, and maintain segregated messing facilities. They contend that each of those alleged practices created a disparate impact on nonwhite job seekers. The district court disagreed, and its findings on those claims contain no clear

error.

I

We examine initially the workers' challenge to the figures adopted by the district court for persons in the labor market available to fill at-issue jobs. The defendants derived those figures from census data, and the figures purport to show the availability of whites and nonwhites for at-issue jobs. The defendants' figures conceive a labor pool that is approximately 90% white. If the 90% figure is accepted, only 4 of 138 at-issue job "families" (groupings of related jobs) contain a disproportionate number of white employees. Although a showing of no little disparity at the "bottom line" is not fatal to a disparate impact claim, *see Connecticut v. Teal,* 457 U.S. 440, 451 (1982), that showing makes the workers' case much more difficult.

At trial the workers viewed the heavily nonwhite, cannery work force itself as the primary, if not exclusive, labor pool for the at-issue jobs. The Supreme Court squarely rejected that view in *Wards Cove* because the cannery-worker pool excluded qualified persons outside the canneries and included unqualified persons within them. *Wards Cove,* 490 U.S. at 651-52. The district court on remand adhered to the defendants' labor market figures, rejecting the workers' arguments that the figures counted whites who were unwilling to take migrant or seasonal work, or to work in the canning industry.

We find no clear error in the district court's reliance on defendant's figures extrapolated from census data. We presume that had the district court adjusted the census numbers as the workers desired, the revamped

statistics would have shown more racial disparity in the four job families in which whites are overrepresented, even under the unreformed census statistics. It also may be true that revamped census data would show bottom-line disparity in additional at-issue job families. The workers fail to specify, however, the degree of change that each modification would yield. They make only an unsupported statement that the adjustments would produce rough agreement between the census and industry numbers in the nonwhite availability figure for at-issue jobs. That statement is not enough for us to overturn the district court's findings, particularly in the absence of a viable competing proposal from the workers.

The workers sought more on remand than merely to reform the census data; they renewed their effort to substitute their own labor pool statistics. They broadened their conception of the pool from that which they had presented to the Supreme Court. They relied on data, which they had introduced at trial, that described employment patterns in the entire Alaskan salmon canning industry. Those data show that the percentage of nonwhites working in the Alaskan salmon canning industry during 1970-78 was 48%. From 1906 to 1939, and from 1941 to 1955, the percentage varied between 47 and 70%. The district court accepted those figures after trial as an accurate portrayal of the racial composition of the entire canning industry work force. The court refused, however, to find that the industry numbers defined the labor pool for at-issue jobs.

We too are unconvinced that industry statistics, rather than census data, yield a more accurate picture of the at-issue labor market. The industry numbers suffer

from the same deficiency that plagued the workers' original labor pool numbers. The workers offer no evidence to determine how many nonwhite industry workers labored in at-issue, as opposed to cannery, jobs. To the extent that the 48% figure includes cannery workers who were unqualified for at-issue jobs, the industry statistics are overinclusive. They also may be underinclusive for failing to count persons who were available and qualified for at-issue work, but who had not worked previously in the industry. The industry numbers therefore fail to meet the requirements established by the Supreme Court in *Wards Cove*, 490 U.S. at 650-51.

The workers also had compiled, as an alternative to the industry data, a statistic that 26% of those who identified their ethnicity on written applications were nonwhite.[10] The district court said that the 26% applicant flow figure was the workers' strongest argument in favor of modifying or throwing out the defendants' labor pool numbers. However, the court ultimately found that the defendants' numbers were more credible than the applicant flow statistic.[11]

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[10] The workers believe that the 26% figure is too low, but they rely upon that figure to make their argument. We decline to speculate whether a higher percentage is more accurate.

[11] The district court also found the 26% figure unreliable because only some at-issue job applicants identified their race on written applications. We need not address that finding because we agree with the district court that the defendants' labor market numbers are more credible

That finding, too, was not clearly erroneous. The data from which the applicant flow statistic was derived made no distinction among those applying for at-issue and for other jobs. Although it appears that written applications for cannery jobs were uncommon, they were not extraordinary. Moreover, even if the applications were addressed only to at-issue jobs, there is no way of knowing how many of those persons were qualified for those jobs. Notwithstanding the workers' position that no objective hiring criteria exist for any at-issue job, we cannot assume that anyone who applied for an at-issue job was qualified.

The workers offered no further evidence of a clearly superior substitute for the defendants' labor pool figures. They observe that bottom-line disparity exists, even under those figures, in four of 138 at-issue job families. However, the workers have produced nothing to link even that disparity to one or more specific employment practices. We cannot presume the existence of an impact without proof of that causal link. *See Wards Cove,* 490 U.S. at 657 (plaintiffs must "specifically show that each challenged practice has a significantly disparate impact"). Because the workers failed to sustain their burden to offer a more reliable alternative than that proffered by defendants, the district court committed no clear error when it adopted the defendants' model of the at-issue labor market.

2

We decided in our en banc proceeding in this case that subjective hiring criteria are amenable to impact

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than the applicant flow statistic.

analysis. *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1482 (9th Cir. 1987) (en banc). We offered little guidance, however, on what kind of showing is sufficient to make out a prima facie case. The difficulties are obvious: how does one show that the application of variable concepts such as "experience" create racial disparity between those hired and those qualified for jobs? *Atonio II* had suggested one course: the workers should present statistics showing a bottom line disparity as prima facie evidence of impact, and then should identify practices which *could have caused* that disparity. *See Atonio II*, 827 F.2d at 444 ("we stress that such statistics can serve to demonstrate the consequences of discriminatory practices which have already been independently established") (citation omitted).

The Supreme Court rejected that course in *Wards Cove*. In refusing to ease the plaintiffs' causation burden with regard to subjective criteria claims, the Court said:

> Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.

Wards Cove, 490 U.S. at 656 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988) (plurality opinion)).

We are acutely aware of the difficulty that the strict causation requirement adopted in *Wards Cove* creates for these plaintiffs in challenging subjective hiring criteria. Nevertheless, we conclude that there is no basis under

Wards Cove to remand the subjective hiring criteria claims in this case. The workers have argued consistently that there are no objective standards, except for an English language requirement, that govern hiring for at-issue jobs. The employers respond by identifying objective criteria for individual families of at-issue jobs, and for the at-issue jobs as a whole. The district court, in both its original and supplemental opinions, found that the existence of those criteria prevented the workers from making out a prima facie case.

The workers argue before us now that the opinion on remand violated an instruction contained in *Atonio II* that the district court determine whether each objective standard had been actually applied in a consistent manner. *See Atonio II,* 827 F.2d at 446. That instruction conforms to the rule "that only 'non-discriminatory standards actually applied by employers are pertinent in a discrimination case.'" *Id.* (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 773 n.32 (1976)) (emphasis in original). *Wards Cove* had no effect upon *Atonio II*'s instruction.

The district court did fail to rule whether the objective hiring criteria had been actually applied. That failure, however, provides no basis for a remand on this issue. There is nothing in this record upon which the workers can rely to show that a racial disparity in hiring arises from the use of subjective hiring criteria. Subjective hiring decisions are not discriminatory per se, *Gay v. Waiters' and Dairy Lunchmen's Union, Local No. 30*, 694 F.2d 531, 554 (9th Cir. 1982), and our acceptance of the defendants' labor pool figures leaves only minimal evidence of racial disparity at the bottom line. There is no evidence to link any bottom-line disparity to the use of

subjective hiring criteria. Therefore, we accept the district court's findings.

3

The parties agree that there were incidents of related whites holding at-issue jobs in the canneries, and the district court presumed that the number of those incidents was statistically significant. The court on remand, however, found that these employees were not hired on the basis of a preference for relatives. The court found instead that the employees had been hired on the basis of their qualifications. The court thus determined that no nepotism existed in hiring for the at-issue jobs.

The district court's finding could be viewed to conflict with the language of *Atonio II,* which stated:

> That the [district] court found individuals were hired for their skills and not because they were relatives serves to dispel the inference of discriminatory intent but it does not meet the defendants' burden in refuting a claim of disparate impact. What is required is that the defendants prove the business necessity of the nepotism policy.

Atonio II, 827 F.2d at 445.

However, *Atonio II* made no explicit finding that related persons in upper-level jobs had been hired because they were relatives. Instead, the opinion rests on an assumption that the district court had found nepotism to exist at the canneries. This assumption, in turn, arose from language in the district court's original opinion that

described hires of related whites as "nepotistic" hires. The court in *Atonio II* was troubled by the contradiction in the district court's apparent findings that nepotism was present, but that there existed no hiring preference for relatives. "If nepotism exists," said the court in *Atonio II*, "it is by definition a practice of giving preference to relatives. . . ." *Id.*

The district court on remand qualified the language it used in its original decision, thereby removing the basis for the assumption of nepotism that underlay *Atonio II*. The term "nepotism," said the district court,

> was used only in its general sense, that being that the plaintiffs introduced evidence that a substantial number of the employees of the defendants were related. This court did not find in its original Opinion, and does not now find, that the defendants favored applicants by reason of their being related to other employees. The evidence is to the contrary.

We accept the district court's acknowledgement that it used the term "nepotism" in an inaccurate way in its original opinion. In our view, nepotism exists when relatives are preferred because of their relationship, whether they are qualified or not. The district court's factual finding, however, is that applicants were not favored because of their relationship. That amounts to a finding that nepotism did not exist. The workers have failed to show that this finding is clearly erroneous; their failure is attributable to the same flaw that plagues much

of their case-- lack of reliable statistical data.[12]

We recognize that nepotism conceivably may have an impact not only on the decision to hire, but also on the decisions to interview, to solicit applications, or to otherwise permit access to at-issue jobs. *See, e.g., Thomas v. Washington County. Sch. Bd.*, 915 F.2d 922, 925 (4th Cir. 1990) ("whatever the benefits of nepotism . . . , those benefits are outweighed by the goal of providing everyone with equal opportunities for employment") (citing *inter alia, Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297, 1303 (9th Cir. 1982), *cert. denied,* 467 U.S. 1251 (1984)).

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[12] The district court found that the plaintiffs' related hire statistics were flawed because they counted persons who married workers in the same department after those persons had already been hired. The defendants also argue that the numbers often count each pair of relatives, the new and established at-issue employee, as two related hires. The workers do not contest that argument, but counter that it is the defendants' burden to show that curing the flaws would remove any statistical disparity. We disagree. The flaws in the workers' related hire statistics do more than render their analysis less precise. *See Equal Opportunity Employment Comm'n v. General Tel. Co. of Northwest, Inc.*, 885 F.2d 575, 582 (9th Cir. 1989), cert. denied, 498 U.S. 950 (1990). The plaintiffs' reluctance to estimate the significance of the flaws strongly suggests that the flaws seriously undermine any inference of discrimination arising from the related hire statistics. *Id.* (discussing *Penk v. Oregon State Bd. of Higher Educ.*, 816 F.2d 458 (9th Cir.), *cert. denied,* 484 U.S. 853 (1987)). In any event, we accept the district court's finding that persons were not hired because they were relatives.

Although there were hints of a preference for interviewing related whites in a few job families, there is insufficient evidence, statistical or otherwise, to establish that such a preference actually existed or was a widespread practice. We cannot say that the district court clearly erred; thus, no remand is warranted on the workers' nepotism claim.

4

Atonio II was somewhat equivocal in its instructions to the district court regarding segregation in messing at the canneries. The court found no clear error in the district court's finding that the segregated messing arrangement was attributable to a local union, whose membership is predominantly Asian and Filipino cannery workers. Those workers preferred an oriental menu. *See Id.* Noting, however, that an agreement with a union provides no immunity for an employer from a discrimination claim, the court in Atonio II instructed the district court to investigate further the workers' messing claims. Id. (citing *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 926 (9th Cir.), *cert. denied*, 459 U.S. 971 (1982)).

On remand the district court ruled that segregated messing created no disparate impact. The court supported its ruling with a finding that the cannery workers were allowed to change their messing assignment if they wished to eat with the skilled workers. Nothing in the district court's decision on this issue conflicts with *Atonio II*, and nothing in the record suggests that the finding of fact is clearly erroneous. We therefore affirm the district court's ruling with regard to messing arrangements.

B

[9] Our outcome is different with regard to disparate impact claims arising from allegations of separate hiring channels, racially-segregated housing, and the race-labelling of jobs, housing, and messing.

1

The canneries concede that they employed word-of-mouth recruiting for upper level jobs, but vehemently dispute the existence of separate hiring channels.[13] The district court did not address these allegations specifically in its original decision, but on remand found as a fact that no separate hiring channels existed.

That finding arguably violated the mandate of *Atonio II*.[14] There we found sufficient indication that the

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[13] We consider these allegations together because the workers presented them in that manner.

[14] We find nothing in the Supreme Court's opinion that opened the door for the district court to create this conflict on remand. The Supreme Court reversed *Atonio II* solely on the basis of our error in giving credit to the workers' comparative statistics. In footnote 9 of the opinion, the Supreme Court briefly offered its characterization of the disposition of other issues in *Atonio II*:

> As we understand the opinions below, the specific employment practices were challenged only insofar as they were claimed to have been responsible for the overall disparity between the number of minor-

district court had implicitly considered the separate hiring channels issue. *Atonio II,* 827 F.2d at 446. We then said:

> The defendant companies do not claim their practices have no impact, rather they assert business justifications for the practices. They say there are no people qualified for skilled jobs in the channels they tap for cannery worker positions, namely Local 37 and the Native villages. However, in considering the claims of the twenty-two individuals who alleged they had been discriminated against, the district court did not find they lack qualifications, but that they did not make timely applications. Thus, there is evidence that some of the people counted in the comparative statistics may be qualified for skilled jobs, and it is not disputed they could fill the at-issue unskilled jobs.

Id. at 447. We observed that word-of-mouth recruiting by predominantly white superintendents and foremen, recruiting among native villagers only for cannery jobs,

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> ity cannery and noncannery workers. The Court of Appeals did not purport to hold that any specified employment practice produced its own disparate impact . . . .

Wards Cove, 490 U.S. at 655 n.9. We refuse to read the footnote as either an adjudication on the merits of the other issues or as a definitive reading of the relevant portions of *Atonio II*. The writ of certiorari in *Wards Cove* did not grant review on any ruling of *Atonio II* that identified an impact arising from a specific employment practice.

and securing cannery workers through Local 37 each contributed to a sense that separate hiring channels did in fact exist at the canneries. *See id.* at 446-47.

Atonio II gave somewhat ambiguous instructions to the district court regarding what to do on remand with the fact of separate hiring channels. We suggested that separate hiring channels are per se discriminatory, see id. at 447 (citing *Barnett v. W.T. Grant Co.*, 518 F.2d 543, 549 (4th Cir. 1975)), and that it was up to the canneries to prove the business necessity of the practice. *Id.* However, earlier in our discussion of the issue we said "that such practices [word-of-mouth recruiting, etc.] can cause a discriminatory impact is obvious." *Id.* at 446 (citing *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1435-36 (9th Cir.) (per curiam), *modified*, 742 F.2d 520 (9th Cir. 1984)).

In light of the causation discussion contained in *Wards Cove*, we interpret *Atonio II* as having instructed the district court to determine initially whether separate hiring channels caused a disparate impact on nonwhites. The district court failed to do that on remand because it erroneously found that no separate hiring channels exist. We therefore remand again for the district court to take up the inquiry where *Atonio II* left off.

The defendants argue that no remand is necessary because their labor market figures show that, of Alaska natives hired for at-issue jobs, the majority of those natives were nonwhite. In addition, the district court had found that nonwhites were free to apply for at-issue jobs. Neither of those considerations avoids the need for a remand.

As with the practice of nepotism, separate hiring channels can deprive job seekers of information that at-issue jobs are available. *See, e.g., United States v. Ironworkers Local 86*, 443 F.2d 544, 548 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971) (identifying an impact where whites were actively recruited, and nonwhites were given "little or no publicity or information concerning procedures for gaining . . . opportunities"). The potential impact goes beyond an effect on who is actually hired, or even who receives an interview. The number of nonwhite hires and the freedom to apply are immaterial if the workers can show that separate hiring channels make it difficult for them as a class to learn of opportunities for at-issue jobs.

It is true that our acceptance of the defendant's labor pool statistics will make it very difficult for the workers to use hiring statistics as prima facie evidence of disparate impact. Furthermore, we have discredited the workers' only applicant flow statistic. There remain, however, the individual claims of deterrence that we recognized in *Atonio II*. *See Atonio II*, 827 F.2d at 447.

The district court refused to consider those claims because it found that the individual workers had failed to submit timely written applications. *Id.* We found that rationale unacceptable in *Atonio II*, concluding that the existence of separate hiring channels and lack of publicity excused workers "from the necessity of establishing the timeliness of their applications and automatically elevat[ing] oral inquiries to the status of applications." *Id.* at 449 (citing *O'Brien v. Sky Chefs, Inc*, 670 F.2d 864, 868 (9th Cir. 1982) *overruled on other grounds, Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1481-82 (9th Cir.1987) (en banc); and *Domingo*, 727 F.2d at 1445). We remand

for the district court to determine initially whether the fact of separate hiring channels, with its accompanying practices, deterred the individual claimants from applying for at-issue jobs. If the court finds that an impact did arise, the canneries will be responsible for articulating a business justification for separate hiring channels.[15]

2

This court in *Atonio II* concluded that segregated housing at the canneries provided a basis for a prima facie claim of disparate impact. "The impact is clear," we said, observing that the segregated bunkhouses "aggravated the isolation of the nonwhite workers from the 'web of information' spread by word-of-mouth among white people about the better paying jobs." *Id.* at 448. On remand, however, the district court found that segregated housing created no adverse impact. Although this finding conflicts with *Atonio II,* the court went on to identify a potentially valid business justification for the situation under the rules articulated by the Supreme Court.

At trial the employers had presented evidence that employees were assigned housing according to their time of arrival, and that the at-issue workers arrived first and were assigned to winterized bunkhouses. When the

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[15] Because the basis of the remand includes a claim of disparate impact arising from an alleged hiring practice, it is too early to say that the canneries' rehire preferences have no discriminatory impact in and of themselves. If the district court determines that separate hiring channels have a disparate impact, it must then consider anew the effect, if any, of the rehire preferences.

cannery workers arrived later in the season, they were assigned to non-winterized bunkhouses because it was then warm enough to make winterized housing unnecessary. The employers argued that winterizing all bunkhouses would be unnecessarily costly. The district court accepted this explanation for the segregated housing, but this court in *Atonio II* was skeptical. Efforts to economize, we said, were a business necessity only if "clearly necessary to promote the proficient operation of the business." *Atonio II,* 827 F.2d at 448. Even if the aim of economy was a business necessity, *Atonio II* continued, the workers deserved an opportunity to present means by which economizing could be achieved with a smaller impact on nonwhites at the canneries. *Id. Atonio II* required the district court to reconsider the employers' explanation in light of the then-prevailing standard.

The Supreme Court, however, eased the standard for evaluating business justifications, and the district court properly applied the revised standard to the facts of this case. A business justification for a challenged practice, said the Supreme Court, need not be "essential" or "indispensable" to the business to rebut the prima facie impact case. *Wards Cove,* 490 U.S. at 659. Instead, the proffered justification need only serve "the legitimate employment goals of the employer." *Id.* The district court on remand found again that the employer's interest in saving money justified its failure to winterize all of the bunkhouses. Although economizing in this way may have been unnecessary to the canneries' success or survival, we cannot say that it fails to serve the legitimate goal of reducing operating costs.

But the existence of a business justification is

insufficient if the plaintiffs show that less onerous alternatives to segregated housing exist. *See Id.* at 660-61.[16] At the post-remand hearing, the district court invited the workers to submit alternatives. The plaintiffs offered two in their supplemental briefs. The district court failed to address the feasibility of alternatives, but merely restated that segregated housing had a business justification.

First, the workers suggested that the canneries assign preseason workers to the largest bunkhouses. Any remaining space, they continued, could be assigned to cannery workers. The record before us, however, undermines the feasibility of this alternative. The largest bunkhouses were not winterized; to follow the workers' suggestion would require the very expenditure which the canneries sought to avoid.

Second, the workers noted that a white superintendent had testified that a number of preseason workers changed bunkhouses at the start of the canning season. It might be possible, they suggest, to require such moves as

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[16] In the Court's language,

> [i]f respondents, having established a prima facie case, come forward with alternatives to petitioners' hiring practices that reduce the racially disparate impact of practices currently being used, and petitioners refuse to adopt these alternatives, such a refusal would belie a claim by petitioners that their incumbent practices are being employed for nondiscriminatory reasons.

Wards Cove, 490 U.S. at 660-61.

a matter of company policy. We cannot say upon this record whether that proposal would prove as effective in avoiding expense as the current arrangement. Plaintiffs are entitled, however, to have the district court consider the feasibility of this second potential alternative. Accordingly, we remand the housing impact claims for a feasibility determination. *See Wards Cove,* 490 U.S. at 660-61.

3

In Atonio II, we observed that "[r]ace labelling is pervasive at the salmon canneries, where 'Filipinos' work with the 'Iron Chink'[17] before retiring to their 'Flip' bunkhouse.'" *Atonio II,* 827 F.2d at 447. Similar statements of management representatives appear in the record, each acknowledging the long- term existence of segregated housing and messing and the association of certain jobs and facilities with nonwhites. At trial the district court found these statements disturbing, but also found them insufficient to raise an inference of an intent to discriminate. In *Atonio II,* we replied: "Perhaps not, but the district court must carry the analysis further and consider whether such a practice has any adverse impact upon minority people, i.e., whether it operates as a headwind to minority advancement." *Id.* The Supreme Court, in reviewing *Atonio II,* did not reach the race-labelling issue, so our directive to the district court remained intact. On remand, however, the district court failed to address the race-labelling issues.

We therefore remand to the district court with

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[17] The employers state that "Iron Chink" is the trademarked name of a particular processing machine.

instructions to follow our prior directive. We also call attention to the Supreme Court's most recent comments dealing with a hostile work atmosphere. "When the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,'. . . that is 'sufficiently severe or pervasive to alter the conditions of the victims' employment and create an abusive working environment,' . . . Title VII is violated." *Harris v. Forklift Systems, Inc.*, 62 U.S.L.W. 4004, 4005 (U.S. Nov. 9, 1993) (quoting *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65, 67 (1986); some internal quotations omitted). The district court should accordingly determine whether race labelling created a discriminatory impact of its own force. The district court should also consider the extent to which this practice may have had an adverse impact on integrated messing and bunking or on minority applications for or hiring into at-issue jobs.

IV

The district court awarded the employers their costs. Because we reverse in part the judgment dismissing the workers' claims, the employers are no longer necessarily a prevailing party entitled to costs. Accordingly, we vacate that award. *See Garrett v. City & County of San Francisco*, 818 F.2d 1515, 1521 (9th Cir. 1987).

The employers and workers each seek an award of attorneys' fees for this appeal. We decline to award fees to the employers under Fed. R. App. P. 38, for this appeal presented serious questions of law and therefore cannot be viewed as frivolous. As for the workers, we leave for the district court to consider whether they are entitled to fees under 42 U.S.C. 2000e-5(k). We do so because our

limited remand requires that the district court determine anew who may be considered a prevailing party in this case, and to what extent. *See Atonio II,* 827 F.2d at 449.[18] We direct that if the district court ultimately awards fees, it shall consider in its award fees for this appeal.

V

[10] We conclude that the Civil Rights Act of 1991 has no application to this case. Therefore, the rules governing disparate impact cases under Title VII that were articulated by the Supreme Court in *Wards Cove* govern the disposition of this appeal. We affirm the district court's determination in favor of the employers with regard to claims of disparate impact caused by subjective hiring criteria, nepotism, and messing arrangements. We determine, however, that the district court's failure to determine whether an impact arose from race-labelling or separate hiring channels necessitates a partial remand. A prior opinion of this court instructed the district court to address those issues, and nothing in the Supreme Court's opinion abrogated or modified that

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[18] We also decline to address in the first instance the employers' claim to have made an offer of judgment under Rule 68, Federal Rules of Civil Procedure which the workers rejected. A party who rejects a Rule 68 offer and obtains a less favorable judgment is ordinarily required to pay the costs of its opponent. Because the offer, assuming that it was tendered, was rejected, it was never made part of the record. Rule 68 provides that a withdrawn offer is admissible only in a cost proceeding. Thus, it is for the district court to consider initially the intersection between Rule 68 and the Title VII fee provision in this case.

instruction. We also conclude that the district court failed to address the feasibility of the workers' alternatives to segregated housing, in response to the employers' business justification defense. We therefore vacate those portions of the district court's judgment and remand for further proceedings.

AFFIRMED IN PART; VACATED IN PART; AND REMANDED WITH INSTRUCTIONS. Each party will bear its own costs.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK ATONIO, EUGENE BACLIG, RANDY del FIERRO, CLARKE KIDO, LESTER KURAMOTO, ALAN LEW, CURTIS LEW, ROBERT MORRIS, JOAQUIN ARRUIZA, BARBARA VIERNES, as administratrix of the estate of Gene Allen Viernes, and all others similarly situated,	)	No.83-4263; 84-3527
	)	D.C. No. CV 74-145 JLQ
	)	OPINION
Plaintiffs-Appellants,	)	
vs.	)	
WARDS COVE PACKING COMPANY, INC., CASTLE & COOKE, INC., and COLUMBIA WARDS FISHERIES,	)	
Defendants-Appellees.	)	

Argued and Submitted

February 18, 1986 - San Francisco, California
En Banc Opinion February 23, 1987

Filed September 2, 1987
Before: Herbert Y.C. Choy, J. Blaine Anderson, and Thomas Tang, Circuit Judges.

Opinion by Judge Tang

Appeal from the United States District Court for the Western District of Washington
Justin L. Quackenbush, District Judge, Presiding

COUNSEL

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OPINION

TANG, Circuit Judge:

I.

Former salmon cannery workers sued their employ-

ers for discrimination on the basis of race, advancing both disparate treatment and disparate impact claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and the Civil Rights Act of 1866, 42 U.S.C § 1981. The district court declined to apply disparate impact analysis to certain subjective employment practices and this panel affirmed that decision. *Atonio v. Wards Cove Packing Co.*, 768 F.2d 1120, 1132 & n.6 (9th Cir. 1985), *withdrawn*, 787 F.2d 462 (9th Cir. 1985). An en banc panel decided that "disparate impact analysis may be applied to challenge subjective employment practices or criteria provided the plaintiffs have proved a causal connection between those practices and the demonstrated impact on members of a protected class." *Atonio*, 810 F.2d 1477, 1482 (9th Cir. 1987)(en banc). The en banc panel returned the cause to this panel to reconsider the district court's disposition of the plaintiffs' claim. *Id.* at 1486.

In our prior decisions we have presented the factual back-ground of this case in considerable detail, and we will not repeat it here. *See Atonio*, 768 F.2d at 1122-24. We have also explained the legal principles governing analysis of Title VII disparate treatment claims. *Id.* at 1124-31. The en banc panel adopted the rule that disparate impact analysis may be applied to the "subjective" employment practices challenged in this case, but it did not explain in any detail how the analysis should be applied. *See Atonio* (en banc), 810 F.2d at 1482. We now provide that explanation, in light of the reasoning and rationale of the en banc panel in adopting impact analysis.

DISPARATE IMPACT ANALYSIS

A class claim of disparate impact is essentially an

allegation that a disparity in the position of nonwhites and white, often proved through statistical evidence, is "the systemic result of a specific employment practice that cannot be justified as necessary to the employer's business." *Segar v. Smith*, 738 F.2d 1249, 1267 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985). The quantity and quality of statistical evidence which will give rise to an inference that the disparity is caused by the employer's practices is the same as that which will give rise to an inference of discriminatory intent. *Id.*

The crucial difference between a disparate treatment and a disparate impact allegation is the intermediate burden on the employer. To rebut the *prima facie* showing of disparate impact the employer may refute the statistical evidence as in the treatment claim and show that no disparity exits. But if the employer defends by explaining the reason for the disparity he must do more than articulate that reason. He must prove the job relatedness or business necessity of the practice. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). The Supreme Court's decision in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981), that the burden of persuasion always stays with the plaintiff in a treatment case expressly preserved the different allocation of burdens in an impact case. The Court stated that it "recognized that the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes." *Id.* at 252 n.5.

Precisely what the employer must prove will vary with the unique factors of different job setting, but "[t]he touchstone is business necessity." *Griggs v. Duke Power Co.*,

401 U.S. 424, 431 (1971). Business necessity of employee selection criteria may be shown by demonstrating that the selection criteria applied are essential to job safety or efficiency, *Dothard v. Rawlinson*, 433 U.S. 321, 331 n.14 (1977), or correlated with success on the job. *Contreras v. City of Los Angeles*, 656 F.2d 1267, 1280 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982). In short, the employer must demonstrate the "manifest relationship" between the challenged practice and job performance. *Griggs*, 401 U.S. at 432. Job relatedness is thus the means of proving "business necessity" when the purpose of a criterion is to predict the capacity of particular individuals to perform a job successfully.

When other employment practices are challenged, whose purpose is not to predict successful job performance, business necessity turns on proof of the burden or benefit to the business of the practice under scrutiny. *See* Schlei and Grossman, *Employment Discrimination Law*, 1329 (2d ed. 1983). Business necessity means more than a business purpose. Business necessity requires that a practice "must substantially promote the proficient operation of the business." *Chrisner v. Complete Auto Transit, Inc.*, 645 F.2d 1251, 1262 (6th Cir. 1981). *See also, Williams v. Colorado Springs School District No. 11*, 641 F.2d 835, 842 (10th Cir. 1981)("The practice must be essential, the purpose compelling."). *Accord Crawford v. Western Electric Co., Inc.*, 745 F.2d 1373 (11th Cir. 1984); *Kirby v. Colony Furniture Co.*, 613 F.2d 696, 705 n.6 (8th Cir. 1980); *Parson v. Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, 1389 (5th Cir. 1978), *cert. denied*, 441 U.S. 968 (1979); *Head v. Timken Roller Bearing Co.*, 486 F.2d 870, 879 (6th Cir. 1973); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

After the employer proves the business necessity of his practices, the plaintiff class has the opportunity to demonstrate that other employment practices or selection devices could serve the employer's needs with a lesser impact on the protected class. *Moody,* 422 U.S. at 425; *Moore,* 708 F.2d at 481; *Chrisner,* 645 F.2d at 1263. Whether the plaintiff's proposed alternative rebuts, or should prevail over, the employer's proof of the business necessity of the original practice is then the ultimate determination to the made.

APPLICATION OF IMPACT ANALYSIS

A. Standard of Review

The ultimate finding of no discriminatory intent in a Title VII action is a factual finding that may by overturned on appeal only if it is clearly erroneous. Fed. R. Civ. P. 52(a); *Anderson v. City of Bessemer,* 470 U.S. 564, 573 (1985); *Pullman Standard v. Swint,* 456 U.S. 273 (1982); *Gibbs v. Pierce County Law Enforcement Support Agency,* 785 F.2d 1396, 1401 (9th Cir. 1986). *See also Kimbrough v. Secretary of the United States Air Force,* 764 F.2d 1279, 1281 (9th Cir. 1985) ("After a Title VII case is fully tried, we review the decision under the clearly erroneous standard applicable to factual determination."). Under the clearly erroneous test, this court must affirm the district court's determination unless "left with the definite and firm conviction that a mistake has been committed." *Gibbs,* 785 F.2d at 1401 (quoting *United States v. United States Gypsum Co.,* 333 U.S. 364, 395 (1948)). The "'district count must decide which party's explanation of the employer's motivation it believes.' We will reverse that factual determination only if it is clearly erroneous .

. . and we will not ransack the record, searching for mistakes." *Casillas v. United States Navy,* 735 F.2d 338, 342-343 (9th Cir. 1984)(quoting *Aikens,* 460 U.S. at 716).

Of course, we review legal questions de novo. *United States v. McConney,* 728 F.2d 1195, 1201 (9th Cir.)(en banc), *cert. denied,* 469 U.S. 824 (1984). The conclusion a district court reaches about whether a Title VII plaintiff has satisfied the elements of a *prima facie* case is reviewed de novo. *See, e.g., Clady v. Los Angeles County,* 770 F.2d 1421, 1427 (9th Cir. 1985), *cert. denied,* 106 S. Ct. 1516 (1986); *Thorne v. City of El Segundo,* 726 F.2d 459, 464 n.5 (9th Cir. 1983), *cert. denied,* 469 U.S. 979 (1984), *appeal after remand,* 802 F.2d 1131 (9th Cir. 1986); *Gay v. Waiters' and Dairy Lunchmen's Union,* 694 F.2d 531, 540-45 & n.13 (9th Cir. 1982). We have also suggested , without deciding the question, that the appropriate standard for reviewing the lower court's conclusion at the third stage of a discriminatory treatment case - proving that an employer's proffered explanation for differential treatment is mere pretext - is also subject to de novo review. *Thorne,* 726 F.2d at 465 & n.6.

B. The Class Claims

As the en banc panel emphasized, a class action pattern and practice case is amenable to both treatment and impact analysis. *Atonio,* 810 F.2d at 1480. In reviewing the district court's resolution of the class claims, our organizational principle is the practices complained of, rather than the mode of proof. But first we discuss the district court's treatment of the statistical evidence offered by both parties.

1. Statistics

Statistical evidence is of critical value in creating an inference of either discriminatory intent or impact. We have recognized the importance of statistics as circumstantial evidence of discriminatory intent, but have cautioned that the weight given to them depends on "proper supportive facts and the absence of variables." *Spaulding v. University of Washington*, 740 F.2d 686, 703 (9th Cir.), *cert. denied*, 469 U.S. 1036 (1984), *overruled on other grounds, Atonio*, 810 F.2d 1477 (en banc). The district court's evaluation of conflicting statistics and determination of the probative weight they are to be accorded is a factual inquiry. Accordingly, we apply the clearly erroneous standard of review. *Gay*, 694 F.2d at 550; *see also Allen v. Prince George's County, Md.*, 737 F.2d 1299, 1303 (4th Cir. 1984).

The plaintiffs introduced comparative statistics showing the disproportionate concentration of nonwhite persons in the lower paying jobs. In analyzing the evidence of disparate treatment, the district court began its inquiry by dividing the at-issue (non-cannery worker) jobs into two groups: unskilled and skilled.

Taking each group in turn, the court first found that the unskilled jobs were fungible, and, thus, comparative statistics were appropriate for use in establishing a *prima facie* case of discrimination. Since the comparative statistic showed a pattern of job segregation throughout the cannery work forces, the court found that the plaintiffs had established a *prima facie* case with respect to the unskilled jobs.

In considering the skilled positions, the district court had more difficulty in finding a *prima facie* case of intentional discrimination, because it did not consider plaintiffs' statistical evidence probative. The court concluded that the practice of hiring through Local 37 had tended to distort the racial composition of the work force. Thus, when considering the skilled positions, the court found that statistics which merely highlight the segregation of whites and nonwhites between the at-issue and cannery worker jobs, without more, could not serve to raise an inference that the segregation is attributable to intentional discrimination against any particular race. Although we accept this finding, we stress that such statistics can serve to demonstrate the consequences of discriminatory practices which have already been independently established. *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1436 (9th Cir.)(per curiam), *modified*, 742 F.2d 520 (9th Cir. 1984).

The cannery workers contend that the district court erred in failing to credit their comparative statistics when analyzing the skilled positions. The district court accorded these statistics, comparing the racial composition of the various job categories, little probative value because they did not reflect the number of employees possessing the requisite skills or these available for preseason work. This was error because when job qualifications are themselves at issue, the burden is on the employer to prove that there are no qualified minority people for the at-issue jobs. *Kaplan v. International Alliance of Theatrical and Stage Employees*, 525 F.2d 1354, 1358 n.1 (9th Cir. 1975); *Wang v. Hoffman*, 694 F.2d 1146, 1148 (9th Cir. 1982). Furthermore, it is unrealistic to expect statistics to be calibrated to reflect preseason availability when the preseason starts

only one month earlier than the season.

The comparative statistics offered by the cannery workers are sufficient to support an inference of discrimination in hiring practices both as to unskilled and skilled jobs. While the district court discounted the comparative statistics in evaluating the claim of intentional discrimination in skilled jobs we find them sufficiently probative of adverse impact. The statistics show only racial stratification by job category. This is sufficient to raise an inference that some practice or combination of practices has caused the distribution of employees by race and to place the burden on the employer to justify the business necessity of the practices identified by the plaintiffs. As the court stated in *Domingo*, comparative statistics demonstrate "the consequences of . . . discriminatory hiring practices." 727 F.2d at 1436.

Thus, in this case, because the comparative statistics support an inference of discriminatory impact, and because the cannery workers have identified certain practices which cause that impact, it is incumbent on the district court to evaluate the business necessity of the practices. Of course, it is also essential that the practices identified by the cannery workers be linked causally with the demonstrated adverse impact.

2. Employment Practices

a. Nepotism

The cannery workers contend that the district court erred in not giving more credit to their evidence of nepotism. The district court noted that "[r]elatives of white

and particularly (sic) nonwhites appear in high incidence at the canneries. However, defendants have established that the relatives hired in at-issue jobs were highly qualified for the positions in which they were hired and were chosen because of their qualifications." The court also found that plaintiffs' statistics failed to recognize that a number of persons became related through marriage after starting work at the canneries, and that the testimony showed "that numerous white persons who 'knew' someone were not hired due to inexperience, and whites hired were paid no more that nonwhites." Therefore, the court concluded that there existed no "preference" for relatives at the canneries.

The district court subjected the cannery workers' nepotism allegations to impact analysis, in accordance with *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297 (9th Cir. 1982), *cert. denied*, 467 U.S. 1251 (1984). We think the district court may have missed the point of *Bonilla* in evaluating nepotism at these canneries. If nepotism exists, it is by definition a practice of giving preference to relatives, and where those doing the hiring are predominantly white, the practice necessarily has an adverse impact on nonwhites. *Id.* at 1303. The evidence shows that of 349 nepotistic hires in four upper-level departments during 1970-75, 332 were of whites, 17 of nonwhites. That the court found individuals were hired for their skills and not because they were relatives serves to dispel the inference of discriminatory intent but it does not meet the defendants' burden in refuting a claim of disparate impact. What is required is that the defendants prove the business necessity of the nepotism policy. *Id.*; *Contreras*, 656 F.2d at 1275-80. As we said in *Bonilla*, generally "nepotistic concerns cannot supersede the nation's paramount goal of

equal opportunity for all." 697 F.2d at 1303.

b. Subjective Criteria

A crucial aspect of the cannery workers' treatment claim was the alleged absence of job criteria and the latitude it allowed for subjective decision making. Courts recognize that subjective criteria are ready mechanisms for discrimination. *See, e.g., EEOC v. Inland Marine Industries,* 729 F.2d 1229, 1236 (9th Cir.), *cert. denied,* 469 U.S. 855 (1984); *Domingo,* 727 F.2d at 1436 n.3. In evaluating a claim of disparate treatment, subjective criteria are suspect because they may mask the influence of impermissible racial bias in making hiring decisions. The district court considered the claim that there were no objective job criteria but found that there were in fact objective criteria. It adopted verbatim from the defendants' pretrial order a list of qualifications which it found "reasonably required for successful performance" of a number of jobs. Opinion at 34. It did not, however, find that these specific criteria were actually applied by those who made hiring decisions, and at one point noted the "general lack of objective job qualifications." Opinion at 60. The court said people were evaluated according to job-related criteria, but in context that statement apparently meant only that the general criteria of experience and skills were considered but subjectively evaluated by hiring officials. Thus the lists merely supported the conclusion that skill and/or experience were the general qualifications looked for in the hiring of employees for the specified jobs. The court also found that the necessary skills are not readily acquirable during the season, primarily due to the time restrictions involved, and that cannery worker jobs do not provide training for other positions. Further, the district court

found that preseason availability is a necessary qualification for many of the positions, but that it is never a requirement for cannery worker jobs. While these findings are not clearly erroneous, and may serve to defeat the inference of discriminatory animus, they do not support a finding that there was no disparate impact occasioned by this practice.

The cannery workers allege that the lack of objective job qualifications and the consequent hiring on the basis of subjective evaluations has an adverse impact on nonwhites in the canning industry. The companies concede the causal relation between their hiring criteria and the number of nonwhites in the at-issue jobs, but argue that there are objective qualifications which differentiate among potential employees in such a way that there are no qualified nonwhites for the at-issue jobs. The district court, as discussed, found there were qualifications for the jobs, including specific skills and experience. We think the court must analyze whether these qualifications were actually applied in a non-discriminatory manner. The Supreme Court has held that only "non-discriminatory standards *actually applied*" by employers are pertinent in a discrimination case. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 773 n.32 (1976) (emphasis in original). There is anecdotal evidence which suggests that these criteria were not applied. For example, the district court found that reasonable qualifications for a dry tender engineer included "one year of related boat experience or six months engine mechanical experience and one season of tender experience." But one dry tender engineer, who was a relative of a company home office employee, had had no mechanical experience or training other than performing preventive maintenance on his car, and no

experience working on a boat.

More importantly, the court must bear in mind that where qualifications are at issue, the burden is on the employer to prove the lack of qualified people in the nonwhite group. *Kaplan*, 525 F.2d at 1358 n.1. As we said in *Wang*, 694 F.2d at 1148, "[h]e cannot be required to prove that he qualified for promotions under a system he alleges to be discriminatory unless the legitimacy of the system is first established." Finally, and most importantly, the court must make findings as to the job-relatedness of the criteria actually applied.

c. Separate Hiring Channels and Word-of-Mouth Recruitment

The cannery workers urge reversal on the ground that the district court's findings failed to address the discriminatory nature of separate hiring channels and word-of-mouth recruitment. We are troubled by this omission. There is, however, sufficient indication that the court considered the practices and apparently found them explained by the companies' professed concerns with honoring their commitments to various unions and finding appropriately skilled workers. *See Nicholson v. Board of Education*, 682 F.2d 858, 866 (9th Cir. 1982).

The cannery workers argue that word-of-mouth recruitment and recruitment for skilled jobs in different channels from those used to fill unskilled jobs are a significant cause of the disparity in the jobs held by whites and nonwhites. Specifically, the companies sought cannery workers in Native villages and through dispatches from ILWU Local 37, thus securing a work force for the lowest

paying jobs which was predominantly Alaska Native and Filipino. For other departments the companies relied on informal word-of-mouth recruitment by predominantly white superintendents and foremen, who recruited primarily white employees. That such practices can cause a discriminatory impact is obvious. *See Domingo,* 727 F.2d 1435-36. This court has long recognized the contribution of separate hiring channels to proving the disparate impact of a pattern or practice of discrimination. In *United States v. Ironworkers Local 86,* 443 F.2d 544, 548 (9th Cir.), *cert. denied,* 404 U.S. 984 (1971), which involved both treatment and impact claims, we held that the "active recruitment of whites, while at the same time giving little or no publicity to information concerning procedures for gaining union membership, work referral opportunities, and the operation of the apprenticeship programs in the black community," was probative of a pattern or practice of discrimination against black in the construction industry. Other courts, too, have long recognized that word-of-mouth recruiting "is discriminatory because of its tendency to perpetuate the all-white composition of a work force." *Barnett v. W.T. Grant Co.,* 518 F.2d 543, 549 (4th Cir. 1975).

The defendant companies do not claim their practices have no impact, rather they assert business justifications for the practices. The companies say there are no people qualified for skilled jobs in the channels they tap for cannery worker positions, namely Local 37 and the Native villages. However, in considering the claims of the twenty-two individuals who alleged they had been discriminated against, the district court did not find they lacked qualifications, but rather that they did not make timely applications. Thus, there is evidence that

some of the people counted in the comparative statistics may be qualified for skilled jobs, and it is not disputed they could fill the at-issue unskilled jobs.

We also point out that logic simply does not support the inference, in a time of widespread unemployment and underemployment, that persons who hold, or are willing to take unskilled jobs, lack the skills for other, more demanding and higher paying jobs. The burden must shift to the companies to prove the business necessity of this practice. The district court observed that it is not a reasonable business practice to seek skilled workers in remote, sparsely populated regions. We cannot agree without a more specific development of the facts and rationale that would explain why it would be unreasonable to notify all potential employees of all job openings available.

We also agree with the plaintiffs that the district court may have erred in crediting the companies' claim that the people in the channels from which it recruited for unskilled jobs were unavailable for preseason work and thus did not meet one of the requirements for many of the at-issue jobs. Residents of Alaska villages would logically be available for the preseason and the evidence simply does not support the broad conclusion that members of Local 37 were unavailable. The preseason begins in May and the season's work begins in June and broad statistics do not tell us enough about the availability of otherwise qualified individuals.

d. Rehire Preferences

The salmon canneries give rehire preference to past

employees in their old jobs. When jobs are racially stratified, giving rehire preference to former employees tends to perpetuate the existing stratification. *Teamsters*, 431 U.S. at 349. It is not clear whether the district court considered whether this practice derived from an intent to discriminate. When it addressed the obvious disparate impact of the practice it held that rehires were justified by business necessity. The court found that the short season and dangers of the industry justified the rehire practice. This finding is supported by the evidence.

3. Race Labeling, Housing and Messing

Race labeling is pervasive at the salmon canneries, where "Filipinos" work with the "Iron Chink" before retiring to their "Flip bunkhouse." The district court did not find the conduct laudatory but found that it was not "persuasive evidence of discriminatory intent." Perhaps not, but the court must carry the analysis further and consider whether such a practice has any adverse impact upon minority people, *i.e.*, whether it operates as a headwind to minority advancement.

The vast majority of cannery employees live at the canneries during the season in bunkhouses provided by the companies. The plaintiff class claimed that nonwhite, particularly Filipinos, were segregated from whites and placed in inferior bunkhouses because of racial discrimination. The district court found that the cannery workers established a *prima facie* case of intentional discrimination, but that the defendants' evidence proved nondiscriminatory motivations which the class failed to prove pretextual. Specifically, the court found that the employees were housed by their time of arrival and by crew rather than

with an intent to discriminate. The record contains sufficient evidence to support the district court's conclusion that the companies articulated a nondiscriminatory reason for their practice.

Cannery workers were also fed separately from the remainder of the work force. They alleged that this was due to racial discrimination. The district court agreed that they had established a *prima facie* case of intentional discrimination, but that the defendants had met their burden of production and the cannery workers had not proved pretext. It is undisputed that the cannery worker mess halls served what is termed a "traditional" oriental menu. The district court noted that the Local 37 contract provided for a separate culinary crew, and that Filipino and Asian persons dominated the membership in Local 37. Further, the court found that the quality and quantity of food served in the respective mess halls were the responsibility of the respective cooks, and that the older cannery workers preferred the traditional menu, to which the younger workers acceded. The court concluded that complaints about the food were attributable to personal taste, and that the segregated messing arrangement was attributable to the union and not the conduct of defendants. There is support in the record for these finding, and we cannot find them clearly erroneous.

The district court also evaluated the complaints of segregated housing and messing under the impact theory and found that business necessity justified these practices. *See Wambheim v. J.C. Penny,* 705 F.2d 1492 (9th Cir. 1983) (impact analysis applies in employment benefits cases), *cert. denied,* 467 U.S. 1255 (1984). The impact is clear in this case. The segregated housing aggravated the

isolation of the nonwhite workers from the "web of information" spread by word-of-mouth among white people about the better paying jobs. *See Domingo,* 445 F. Supp. 421, 435 (W.D. Wash. 1977), *aff'd,* 727 F.2d 1429 (9th Cir.), *modified,* 742 F.2d 520 (9th Cir. 1984). But the district court found the companies could not be required to winterize all of their housing when bunkhouse assignments by date of availability renders such an expenditure unnecessary. We hold that such a rationalization is not sufficient, without more, to sustain a finding of business necessity. Efforts to economize may be viewed as a business necessity only if the companies substantiate that these measures are clearly necessary to promote the proficient operations of the business. *See Chrisner,* 645 F.2d at 1262. Even if economizing is seen as a business necessity, the plaintiffs must have the opportunity to show that it could be accomplished with a lesser impact upon the nonwhite people in the cannery work-force.

The court found the separate mess facilities mandated by the employer-union agreements with Local 37. Since it also correctly noted that an agreement with a union will not immunize an employer from discrimination claims, *Williams v. Owens-Illinois, Inc.,* 665 F.2d 918, 926 (9th Cir.), *cert. denied,* 459 U.S. 971 (1982), we are unsure what its conclusion was as to the discriminatory impact of separate messing.

In assessing how racial labeling and segregated housing and messing facilities may cause an adverse impact we suggest that the court consider the message that such practice conveys to the general population. As the Supreme Court has warned:

> The ["whites only"] message can be communicated to potential applicants more subtly but just as clearly by an employer's actual practices by his consistent discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, his recruitment techniques, his responses to casual or tentative inquiries, and even by the racial or ethnic composition of that part of his work force from which he has discriminatorily excluded members of minority groups.

Teamsters, 431 U.S. at 365

C. Individual Claims

Twenty two plaintiffs alleged that they were either overtly discriminated against in the hiring for at-issue positions, or that they were deterred from seeking at-issue positions because of the defendants' alleged history of pervasive discrimination. The district court correctly noted that a plaintiff seeking relief under 42 U.S.C. § 1981 must show intentional discrimination and then analyzed the § 1981 and the Title VII treatment claims under the *McDonnell Douglas* test. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The court found the individuals had failed to establish a *prima facie* case because they could not show they had applied for existing job openings and thus no inference of discriminatory intent arose. They had made oral inquiries, which were not considered applications, or their applications were untimely. Applications could be untimely if made too early or too late. Testimony showed that some plaintiffs had orally inquired during one season about positions for the next season a year away, and such inquires were not

considered an application unless followed up by a written application to the home office during the winter. Conversely, because the companies generally received far more applications than there were job vacancies, an application was untimely if received after the opening was filled. The district court found that the defendants did not treat whites and nonwhites differently in these respects. The court also found that some applicants had been unavailable for preseason work and, therefore, unavailable for the positions they desired. While there is evidence in the record to support the district court's findings regarding these individual claims, the findings are premature in light of the decision that the practices of these employers must be evaluated for disparate impact.

The cannery workers argue persuasively that the companies' use of separate hiring channels and word-of-mouth recruitment, and their failure to announce vacancies should serve to excuse the cannery workers from the necessity of establishing the timeliness of their applications and automatically elevate oral inquires to the status of applications. *See O'Brien v. Sky Chef*, 670 F.2d 864, 868 (9th Cir. 1982), *overruled on other grounds, Atonio*, 810 F.2d 1477 (en banc). The cannery workers' argument derives from a discussion of damages issues in *Domingo*, 727 F.2d at 1445. In *Domingo* we said it would be an unrealistic burden on claimants to prove timely applications when application procedures were informal and word-of-mouth recruitment made it difficult for present or prospective employees to become aware of openings when they occurred. *Id.* For the same reasons, if the district court in this case finds that the challenged practices violate Title VII under the impact analysis, it must then conduct additional proceedings to determine appropriate

individual relief, even though individuals have not persuaded the court of their disparate treatment. *See Teamsters,* 431 U.S. at 361; *Franks,* 424 U.S. at 773 n.32.

D. The Motion for Attorney's Fees

We decline to entertain any motion for attorney's fees at this point in this litigation. There are issues of fact and law remaining for determination. We leave to the district court to determine, upon proper motions, properly supported, whether and to what extent any party is a prevailing party for the purposes of an award of attorney's fees. *See Hensley v. Echerhart,* 461 U.S. 424 (1983). If any fee award is made it shall include appropriate consideration of fees for this appeal and all proceedings in the district court.

The judgement is VACATED and the cause is REMANDED for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK ATONIO, EUGENE BACLIG, RANDY del FIERRO, CLARKE KIDO, LESTER KURAMOTO, ALAN LEW, CURTIS LEW, ROBERT MORRIS, JOAQUIN ARRUIZA, BARBARA VIERNES, as administratrix of the estate of Gene Allen Viernes, and all others similarly situated,	)	No.83-4263, 84-3527
Plaintiffs-Appellants,	)	D.C. No. CV 74-145 JLQ
vs.	)	OPINION
WARDS COVE PACKING COMPANY, INC., CASTLE & COOKE, INC., and COLUMBIA WARDS FISHERIES,	)	
Defendants-Appellees.	)	

Argued and Submitted En Banc
February 18, 1986 - San Francisco, California

Filed February 23, 1987
Before: Browning, Goodwin, Wallace,
Sneed, Anderson, Hug, Tang, Schroeder,
Fletcher, Pregerson, and Reinhardt,
Circuit Judges.

Opinion by Judge Tang; Concurrence by Judge Sneed,
with whom Goodwin, Wallace, and Anderson join,
Concurring Separately

Appeal from the United States District Court for the
Western District of Washington
Justin L. Quackenbush, District Judge, Presiding

COUNSEL

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OPINION

TANG, Circuit Judge:

We grant en banc review in this Title VII race discrimination case to decide two questions. First, we decide the procedure a panel should follow when faced with an irreconcilable conflict between the holdings of controlling prior decisions of this court. Second, we resolve that irreconcilable conflict, by deciding that disparate impact analysis may be applied to subjective employment practices. The district court declined to apply disparate impact analysis on the authority of *Heagney v. University of Washington*, 642 F.2d 1157 (9th Cir. 1981)(practice of hiring without well-defined criteria cannot be subjected to disparate impact analysis) and chose to disregard the later decision in *Wang v. Hoffman*, 694 F.2 d 1146 (9th Cir. 1982) (lack of objective criteria for promotion can be analyzed for disparate impact). The Ninth Circuit panel that heard the appeal from the judgment for the employers in the instant case noted our conflicting decisions but held it was bound by *Heagney* because it expressed the "correct view" or, alternatively, because it was the decision "first in line." *Atonio v. Wards Cove Packing Co., Inc.*, 768 F.2d 1120, 1132 and n.6 (9th Cir. 1985), *withdrawn*, 787 F.2d 462 (9th Cir. 1985).

The panel's approach did not resolve the broader question of how future panels should decide a case controlled by contradictory precedents. We now hold that the appropriate mechanism for resolving an irreconcilable conflict is an en banc decision. A panel faced with such a conflict must call for en banc review, which the court will normally grant unless the prior decisions can be distinguished. Despite the "extraordinary" nature of en banc review, *United States v. American-Foreign Steamship Corp.*, 363 U.S. 685, 689 (1960), and the general rule that en banc

hearings are "not favored," Fed. R. App. P. 35(a), en banc review is proper "when consideration by the full court is necessary to secure or maintain the uniformity of its decisions." Fed. R. App. P. 35(a)(1); *see also American-Foreign Steamship,* 363 U.S. at 689-90.

Turning to the substantive question which produced our conflicting prior decisions, we note that this case arises out of the cannery workers' allegations of both disparate treatment and disparate impact. Thus it affords us the opportunity to refine the analytic tools for the identification and eradication of unlawful discrimination. Specifically, we now determine that disparate impact analysis may be applied to subjective employment practices.

I. BACKGROUND

Former salmon cannery workers brought a class action suit charging three companies with employment discrimination on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e (1982) and the Civil Rights Act of 1866, 42 U.S.C. §1981 (1982). The class alleged both disparate treatment and disparate impact claims on behalf of minority persons. It alleged that the pronounced concentration of Asian and Alaska Native employees in the lowest paying cannery worker and laborer positions and the relative scarcity of such minority employees in the higher paying positions proved disparate treatment of minority people. It also alleged that certain specific employment practices of the companies proved both disparate treatment of and disparate impact on minority people. The cannery workers challenged the companies' use of separate hiring channels for cannery

workers from those used for the higher paying, at-issue jobs, as well as word-of-mouth recruitment, nepotism, rehire policies, and the lack of objective job qualifications.

The majority of cannery workers are hired from native villages in Alaska and through a local union of primarily Filipino members of the International Longshoremen's and Warehousemen's Union (ILWU) in Seattle. Consequently, cannery workers are almost all members of these ethnic groups. All other positions are filled through applications received during the off-season at the mainland home offices, through rehiring previous employees and through word-of-mouth recruitment. These positions are held predominantly by white people. Another challenged practice, of particular relevance in our en banc review of this case, is the apparent lack of objective qualifications for many job classifications, and the resultant use of subjective criteria in hiring and promoting. When filling most job positions, the respective hiring officers generally seek to hire the individuals who are, in the hiring officer's opinion, the best for the job.

In addition to the racial stratification of jobs, the cannery workers complain that even those nonwhites who obtain positions with the companies are treated differently from whites. They allege that nonwhites are segregated from whites in housing and messing, and that the bunkhouses and food provided for nonwhites are far inferior to those provided for whites.

In holding for the defendant companies, the district court evaluated the evidence introduced by both sides, including conflicting statistical data. The court analyzed all the cannery workers' claims for intentional discrimination,

and concluded that the companies had successfully shown nondiscriminatory motivations for their practices. Despite the cannery workers' contrary arguments, the court, relying on Ninth Circuit authority, refused to evaluate all of the claims under the disparate impact model of Title VII. The court subjected a few claims to disparate impact analysis and again found for the defendants.

II. ANALYSIS

A. Title VII Liability

Section 703(a)(2) of Title VII, 42 U.S.C. §2000e-2(a)(2)(1982), provides that:

> It shall be an unlawful employment practice for an employer
>
> . . .
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

An employee may prove an employer's Title VII liability through a theory of disparate treatment or a theory of disparate impact. Proof of disparate treatment requires a showing that the employer intentionally "treats some people less favorably than others because of their race, color, religion, sex, or national origin." *International Brotherhood of Teamsters v. United States,* 431 U.S. 324,

335 n.15 (1977). An illicit motive may be inferred in an individual discrimination claim when the plaintiff shows he is a member of a protected class who applied for, and failed to get, a job for which he was qualified and which remained open after his rejection. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973). An illicit motive may be inferred in a class-wide discrimination claim from a sufficient showing of disparity between the class members and comparably qualified members of the majority group. *Segar v. Smith,* 738 F.2d 1249, 1265-66 (D.C. Cir. 1984), *cert. denied,* 1051 S. Ct. 2357 (1985) (citing *Teamsters,* 431 U.S. at 335 n.15).

A disparate impact claim challenges "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Teamsters,* 431 U.S. at 336 n.15. Illicit motive is irrelevant because impact analysis is designed to implement Congressional concern with "the *consequences* of employment practices, not simply the motivation." *Griggs v. Duke Power Co.,* 401 U.S. 424, 432 (1971) (emphasis in original). In a class action suit, commonly known as a "pattern or practice" case, plaintiffs typically assert claims both of disparate treatment occasioned by an employer's practices and of disparate impact produced by those practices. *Segar,* 738 F.2d at 1266. As the Supreme Court noted in *Teamsters,* a pattern and practice class action case, "[e]ither theory may, of course, be applied to a particular set of facts." 431 U.S. at 336 n.15.

B. Impact Analysis in the Ninth Circuit

1. Conflict

Disparate treatment and disparate impact are but two analytic tools which may be used in the appropriate Title VII case to resolve the ultimate question, whether there has been impermissible discrimination by an employer. *See, e.g., Goodman v. Lukens Steel Co.*, 777 F.2d 113, 130 (3d Cir. 1985). Despite the *Teamsters* language stating that either theory may be applied to a set of facts, courts have not uniformly interpreted the scope of impact analysis.[1]

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[1] The Second, Third, Sixth, Tenth, Eleventh and District of Columbia Circuits apply impact analysis to subjective practices and criteria. *See e.g., Zahorik v. Cornell University*, 729 F.2d 85 (2d Cir. 1984); *Grant v. Bethlehem Steel Corp.*, 635 F.2d 1007 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981); *Wilmore v. City of Wilmington*, 699 F.2d 667 (3rd Cir. 1983); *Rowe v. Cleveland Pneumatic Co., Numerical Control, Inc.*, 690 F.2d 88 (6th Cir. 1982); *Hawkins v. Bounds*, 752 F.2d 500 (10th Cir. 1985); *Lasso v. Woodmen of World Life Insurance Co., Inc.*, 741 F.2d 1241 (10th Cir. 1984), *cert. denied*, 105 S.Ct. 2320 (1985); *Coe v. Yellow Freight Systems, Inc.*, 646 F.2d 444 (10th Cir. 1981); *Williams v. Colorado Springs School District No. 11*, 641 F.2d 835 (10th Cir. 1981); *Griffin v. Carlin*, 755 F.2d 1516 (11th Cir. 1985); *Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 105 S.Ct. 2357 (1985). The Fourth Circuit does not apply impact analysis to subjective criteria. *See, e.g., E.E.O.C. v. Federal Reserve Bank*, 698 F.2d 633 (4th Cir. 1983), *rev'd on other grounds sub nom. Cooper v. Federal Reserve Bank*, 467 U.S. 867 (1984); *Pope v. City of Hickory*,

Differences have arisen from the conflicting views of whether impact analysis can be applied to evaluate employment procedures or criteria different from the objective test and diploma requirement scrutinized in the seminal *Griggs* decision or the height and weight requirements analyzed in *Dothard v. Rawlinson*, 433 U.S. 321

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679 F.2d 20 (4th Cir. 1982); *but see Brown v. Gaston County Dying Machine Co.*, 457 F.2d 1377 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972); *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971). The Fifth, Seventh and Eighth Circuits have reached conflicting results, sometimes applying impact analysis and sometimes refusing to apply it. *See, e.g., Page v. U.S. Industries, Inc.*, 726 F.2d 1038 (5th Cir. 1984); *Rowe v. General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972) (applying impact analysis); *contra Bunch v. Bullard*, 795 F.2d 384, 394 (5th Cir. 1986); *Vuyanich v. Republic National Bank*, 723 F.2d 1195 (5th Cir.), *cert. denied*, 105 S. Ct. 567 (1984); *Pegues v. Mississippi State Employment Service*, 699 F.2d 760 (5th Cir.), *cert. denied*, 464 U.S. 991 (1983); *Carroll v. Sears Roebuck & Co.*, 708 F.2d 183 (5th Cir. 1983); *Pouncy v. Prudential Insurance Co.*, 668 F.2d 795 (5th Cir. 1982); *Griffin v. Board of Regents*, 795 F.2d 1281, 1288-89 and n.14 (7th Cir. 1986)(refusing to apply impact analysis); *contra Clark v. Chrysler Corp.*, 673 F.2d 921 (7th Cir.), *cert. denied*, 459 U.S. 873 (1982); *Tally v. United States Postal Service*, 720 F.2d 505 (8th Cir. 1983), *cert. denied*, 466 U.S. 952 (1984); *Harris v. Ford Motor Co.*, 651 F.2d 609 (8th Cir. 1981)(refusing to apply impact analysis); *contra Gilbert v. Little Rock*, 722 F.2d 1390 (8th Cir. 1984), *cert. denied*, 104 S. Ct. 2347 (1984).

(1977).[2]

This circuit has clearly held that subjective practices and decisions are not illegal *per se*. *Heagney v. University of Washington*, 642 F.2d 1157, 1163 (9th Cir. 1981). At the same time, we have stated that subjective practices are particularly susceptible to discriminatory abuse and should be closely scrutinized. *Kimbrough v. Secretary of United States Air Force*, 764 F.2d 1279, 1284 (9th Cir. 1985); *Nanty v. Barrows Co.*, 660 F.2d 1327, 1334 (9th Cir. 1984). The conflict in our decisions has developed because prior panels have not all agreed that the close scrutiny of subjective practices can or should take the form of a disparate impact analysis.

In *Heagney*, the plaintiff challenged the University's power to classify certain jobs as "exempt" from state

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[2] *See, e.g. Page v. U.S. Industries, Inc.*, 726 F.2d 1038, 1054 (5th Cir. 1984)(applying impact analysis to subjective employment practices in accord with *Rowe v. General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972) because "promotional systems which depend upon the subjective evaluation and favorable recommendation of immediate supervisors provide a ready vehicle for discrimination."); *E.E.O.C. v. Federal Reserve Bank*, 698 F.2d 633, 639 (4th Cir. 1983), *rev'd on other grounds sub nom. Cooper v. Federal Reserve Bank*, 467 U.S. 867 (1984)(allegedly discriminatory promotion policies could not be subjected to impact analysis because the subjective criteria did not amount to an "objective standard, applied evenly and automatically" as are a diploma requirement, a test or a minimum height or weight requirement).

personnel laws, which, in turn, gave the school more discretion in setting salaries. We held that the crux of the complaint was an objection to the lack of well-defined criteria, which could not be equated with practices such as personnel tests or minimum physical requirements. Thus, although we had previously noted that both treatment and impact analysis may be applied, we held that impact analysis was inappropriate. *Heagney,* 642 F.2d at 1163. We followed *Heagney* in *O'Brien v. Sky Chefs,* 670 F.2d 864, 866 (9th Cir. 1982) and refused to apply impact analysis to an employer's lack of well-defined promotion criteria, noting that the lack of such criteria does not *per se* cause an adverse impact.

On the other hand, this court has applied impact analysis to subjective criteria in at least two cases. In *Wang v. Hoffman,* 694 F.2d 1146, 1148 (9th Cir. 1982), which challenged the hiring and promotion policies of the Army Corps of Engineers, the panel held that a promotion system lacking objective criteria could be challenged for its disparate impact, and in *Peters v. Lieuallen,* 746 F.2d 1390, 1392 (9th Cir. 19884), the panel held that impact analysis could be applied to subjective criteria used during interviews to screen candidates, but that the plaintiff must show that use of the criteria caused the adverse impact. *See also Yartzoff v. Oregon,* 745 F.2d 557, 558 (9th Cir. 1984)(impact analysis of subjective promotion criteria appropriate in age discrimination case, but plaintiff failed to offer proof of disparate impact).

In subsequent cases we have recognized the conflict between *Heagney* and *Wang,* but felt it unnecessary to resolve the question. *See Moore v. Hughes Helicopters,* Inc., 708 F.2d 475, 481 (9th Cir. 1983) (noting that "[t]he law in

this court is unsettled" stated disparate treatment focus well suited to analysis of subjective decision making); *Spaulding v. University of Washington,* 740 F.2d 686, 709 (9th Cir.) (lack of well defined criteria facilitating wage discrimination better presented under disparate treatment model on the authority of *Heagney,* followed by a *"but cf."* citation to *Wang*), *cert. denied,* 105 S.Ct. 511 (1984).

2. Resolution

We now hold that disparate impact analysis may be applied to challenge subjective employment practices or criteria provided the plaintiffs have proved a causal connection between those practices and the demonstrated impact on members of a protected class. The three elements of the plaintiffs' prima facie case are that they must (1) show a significant disparate impact on a protected class, (2) identify specific employment practices or selection criteria and (3) show the causal relationship between the identified practices and the impact. We are persuaded that this holding comports with the express language of the statute, the intent of Congress as revealed in its discussions of the 1972 amendments, the enforcement agencies' interpretation, and the broad prophylactic purposes of Title VII.

3. Rationale

a. Statutory Language

We begin with the observation that Title VII proscribes all forms of employment discrimination. It does so without reference to either objective or subjective practices. Title VII states that it is an unlawful employ-

ment practice "to limit, segregate, or classify . . . employees or applicants for employment in *any way*." 42 U.S.C. §2000e-2(a)(2)(1982)(emphasis added). The Supreme Court construed this language as proscribing "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs*, 401 U.S. at 431. The Court developed the disparate impact model for proving discrimination in recognition of Congress' intent to remove "artificial, arbitrary, and unnecessary barriers to employment." *Id.* Although *Griggs* involved requirements of a high school diploma and an objective test, the opinion did not expressly limit impact analysis to such criteria.

b. Congressional Intent

There is considerable evidence that Congress endorsed the *Griggs* decision during discussion of amendments to Title VII in 1972. H.R. Rep. No. 238, 92nd Cong., 1st Sess. 19, 24 (1971), *reprinted in* 1972 U.S. Code Cong. & Ad. News 2137, 2164; S. Rep. No. 415, 92d Cong., 1st Sess. 1, 14-15(1971); *Connecticut v. Teal*, 457 U.S. 440, 447 n.8 (1982); *see* Helfand and Pemberton, *The Continuing Vitality of Title VII Disparate Impact Analysis*, 36 Mercer L. Rev. 939, 948-54 (1985). The section-by-section analyses of the 1972 amendments submitted to both houses of Congress expressly stated that in areas not addressed by the amendments, existing case law was intended to continue to govern. 118 Cong. Rec. 7166, 7564 (1972); *Teal*, 457 U.S. at 447 n.8. Thus, although Title VII was not amended specifically to extend disparate impact analysis to subjective practices, decisional law incorporated at that time included not only *Griggs*, but such cases as *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 657-58 (2d Cir. 1971), which applied *Griggs* to invalidate subjective hiring

standards and procedures.

c. Enforcement Agencies' Interpretation

Additional authority for our decision to apply the disparate impact model is found in the announcement of the four agencies charged with enforcement of Title VII -- the Equal Employment Opportunity Commission, the Office of Personnel Management, the Department of Justice and the Department of Labor -- that the law requires application of the disparate impact model to all selection procedures whether subjective or objective. *Griffin v. Carlin*, 755 F.2d 1516, 1525 (11th Cir. 1985). The Uniform Guidelines on Employee Selection Procedures, adopted in 1978, define the procedures to which impact analysis applies as:

> [a]ny measure, combination of measures, or procedure used as a basis for any employment decision. Selection procedures include the full range of assessment techniques from. . . physical, educational, and work experience requirements through informal or casual interviews.

29 C.F.R. § 1607.16(Q)(1985).

Because the statutory language and legislative history support the administrative interpretation, the guidelines are "entitled to great deference," and can be treated as "expressing the will of Congress." *Griggs*, 401 U.S. at 434.

d. Purpose of Title VII

Applying the tool of disparate impact analysis to subjective practices and criteria is necessary to fully

implement the prophylactic purpose of Title VII to achieve equal employment opportunity and remove arbitrary and unnecessary barriers which have operated to favor white male employees over others. *Teal,* 457 U.S. at 451; *Teamsters,* 431 U.S. at 364; *Griggs,* 401 U.S. at 431. It is essential precisely because such practices will quite often lack any discriminatory animus. Subjective practices can operate as "'built-in headwinds'" for minority groups as readily as can objective criteria, *Griggs,* 401 U.S. at 432, and these practices should likewise be exposed and eradicated when they cause adverse impact without proof of a redeeming business necessity. The Supreme Court has not held otherwise.

e. Furnco

There has been considerable discussion about the meaning of *Furnco Construction Corp. v. Waters,* 438 U.S. 567 (1978). Some courts and commentators suggest the Supreme Court restricted the application of *Griggs* impact analysis to objective criteria.[3] The majority of circuits, however, do not subscribe to this reading of *Furnco* and have applied impact analysis to subjective practices.[4]

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[3] *See, e.g., Larson,* 3 Employment Discrimination §76.36 n.90 (1984 & Supp. Nov. 1985)(collecting cases).

[4] *See, e.g., Grant v. Bethlehem Steel Corp.,* 635 F.2d 1007 (2nd Cir. 1980), *cert. denied,* 452 U.S. 940 (1981)(a post *Furnco* decision in which, on virtually identical facts, the court held that word of mouth hiring should be evaluated as discriminatory treatment and for discriminatory impact. *Id.* at 1016-17); *Bauer v. Bailar,* 647 F.2d 1037, 1043 (10th Cir. 1981)("Subjective hiring and promotion decisions, particu-

The employment practice challenged in *Furnco* was the refusal to accept jobsite applications for bricklayers to reline blast furnaces with firebrick. Instead, the job superintendent hired only bricklayers he knew were experienced or who had been recommended by his foremen. *Furnco*, 438 U.S. at 570. In applying the *McDonnell Douglas* formula of disparate treatment the Court noted the case did not implicate employment tests previously treated in *Griggs* and *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 412-13 (1975)(Moody), or particularized physical requirements such as those discussed in *Dothard*, 433 U.S. at 329, and that it was not a pattern and practice case as was *Teamsters*, 431 U.S. at 358. *Furnco*, 438 U.S. at 575 n.7.

We do not read this footnote to preclude impact analysis of the claims presented in the case at bar. Clearly, the facts giving rise to allegations of discrimination may support a prima facie case of disparate treatment or disparate impact. *See, Teamsters*, 431 U.S. at 336 n.15 ("[e]ither theory may, of course, be applied to a particular set of facts.") In other words, *Furnco* imposes no limitation on use of impact analysis beyond the restrictions inherent in demonstrating a *prima facie* case.

The *Furnco* plaintiffs identified a specific practice, but were unable to prove that the practice had an adverse impact on black bricklayers. 438 U.S. at 571. Because they failed to demonstrate disparate impact, they failed to es-

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larly where made in the absence of specific standards and guidelines[,] may not go unexplained if there is a significantly disproportionate non-selection of members of a [protected] group . . ."). *See also* cases cited *supra*, n.1.

tablish a *prima facie* case of disparate impact, and thus, use of that analytic tool was inappropriate.

In contrast, the plaintiffs in this case contend they are consigned to lower paying jobs by a system of racial segregation implemented through a variety of specific employment practices. The statistics provide evidence of a significant disparate impact and the challenged practices are agreed to cause disparate impact. Thus, these plaintiffs are entitled to the application of impact analysis as an appropriate analytic tool to challenge the discriminatory effect of the companies' practices because they have satisfied the elements of the prima facie case; a significant disparate impact on a protected class, the identification of specific employment practices or selection criteria and a causal relationship between the identified practice and the impact.

f. Logic Supports Impact Analysis

Although the language of the statute and Congressional discussions of Title VII, as well as Supreme Court pronouncements are sufficient authority for the application of disparate impact analysis to subjective employment practices, we should also note that we are unpersuaded by the defendants' objections to our decision based on appeals to logic or social policy. Defendants argue that there is a logical basis for a distinction between objective and subjective practices and for the correlative categorization of the analysis of the proof of impermissible discrimination. In their view subjective practices are by nature and definition based upon intent and thus should be evaluated only for discriminatory animus. They argue that only objective practices can be evaluated for disparate impact.

We disagree. Subjective practices may well be a covert means to effectuate intentional discrimination, as the defendants point out, but they can also be engendered by a totally benign purpose, or carried on as a matter of routine adherence to past practices whose original purposes are undiscoverable. Subjective practices are as likely to be neutral in intent as objective ones.[5] If, in fact, the subjective practices are a "covert means" to discriminate intentionally, by definition intent will be difficult to prove. If the practices are the cause of adverse impact, the purposes of Title VII are well-served by advancing proof of adverse impact, thereby obviating the necessity of proving intent. Proof of intent where adverse impact can be shown may be not only unnecessary but undesirable because of the animus the process generates.

We also do not agree that only objective practices can be analyzed for disparate impact. When we view employment practices from the perspective of their impact on a protected class, we are unable to see a principled and meaningful difference between objective and subjective practices. There is no bright line distinction between objective and subjective hiring criteria, because almost all criteria necessarily have both subjective and objective elements. For example, while the requirement of a certain test score may appear "objective," the choice of skills to be tested and of the testing instruments to measure them

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[5] *See* D. Baldus and J. Cole, *Statistical Proof of Discrimination* §1.23 (1980 & Supp. 1985)("The logic of the disparate impact doctrine appears to apply to covert legitimate policies, no matter how discretionarily they are applied, as well as it does to overt nondiscretionary criteria.")

involves "subjective" elements of judgment. Such apparently "subjective" requirements as attractive personal appearance in fact include certain "objective" factors. Thus the terms merely represent extremes on a continuum, and cannot provide a line of demarcation to guide courts in choosing the appropriate analytic tool in a Title VII discrimination case.

Finally, we think a distinction between subjective and objective practices serves no legitimate purpose. To the contrary, preserving the distinction could serve to encourage employers to abandon "objective" criteria and practices in favor of "subjective" decision making as a means of shielding their practices from judicial scrutiny. It would subvert the purpose of Title VII to create an incentive to abandon efforts to validate objective criteria in favor of purely discretionary hiring methods. *See Griffin v. Carlin*, 755 F.2d 1516, 1525 (11th Cir. 1985)("Rather than validate education and other objective criteria, employers could simply take such criteria into account in subjective interviews . . It could not have been the intent of Congress to provide employers with an incentive to use such devices rather than validated objective criteria.")

g. Policy Considerations Support Impact Analysis

The defendants argue that the burden placed on an employer in an impact case is somehow made unduly onerous when the practices identified as having a disparate impact are subjective in nature. A class claim of disparate impact is essentially an allegation that a disparity in the position of nonwhites and whites, often proved through statistical evidence, is "the systemic result of a

specific employment practice that cannot be justified as necessary to the employer's business." *Segar,* 738 F.2d at 1267. As in a disparate treatment claim, the initial burden is on the plaintiffs. To establish a *prima facie* case of disparate impact, the plaintiffs must prove that a specific business practice has a "significantly discriminatory impact." *Teal,* 457 U.S. at 446; *Dothard,* 433 U.S. at 329. To reiterate, plaintiffs' *prima facie* case consists of a showing of significant disparate impact on a protected class, caused by specific, identified, employment practices or selection criteria.

Once the plaintiff class has shown disparate impact caused by specific, identifiable employment practices or criteria, the burden shifts to the employer. The crucial difference between a treatment and an impact allegation is the intermediate burden on the employer. To rebut the *prima facie* showing of disparate impact the employer may refute the statistical evidence as in the treatment claim and show that no disparity exists. But if the employer defends by explaining the reason for the disparity he must do more than articulate that reason. He must prove the job relatedness or business necessity of the practice. *Moody,* 422 U.S. at 425. The Supreme Court's decision in *Burdine* that the burden of persuasion always stays with the plaintiff in a treatment case expressly preserved the different allocation of burdens in an impact case. The Court stated that it "recognized that the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes." 450 U.S. at 252 n.5.

Precisely what the employer must prove will vary

with the factors of different job settings, but "[t]he touchstone is business necessity." *Griggs,* 401 U.S. at 431. In our view, proving business necessity is no more onerous in a case involving subjective practices than one involving objective practices, because in either case the employer is the person with knowledge of what his practices are and why he uses the methods and criteria he does, as well as the person with superior knowledge of precisely how his employment practices affect employees. *See Segar,* 738 F.2d at 1271; *Pouncy v. Prudential Insurance Co.,* 668 F.2d 795, 801 (5th Cir. 1982). The burden of proof on the employer is commensurate with the greater burden on the plaintiff to prove impact and to establish the causal connection between the practices and the impact. Once a challenged practice which causes disparate impact is identified, it does not place an unfair burden to ask an employer to justify the challenged practice.[6] We emphasize that while proving business necessity may be "an arduous task," *Bunch v. Bullard,* 795 F.2d 384, 393 n.10 (5th Cir. 1986), this burden will not arise until the plaintiff has shown a causal connection between the challenged practices and the impact on a protected class.

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[6] We note that a related concern is that the "impact model is not the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices." *Spaulding,* 740 F.2d at 707. However, this is not such a case. The class has not simply complained about the overall consequences of a collection of unidentified practices; rather it has identified specific employment practices which cause adverse impact. These specific practices which cause adverse impact may be considered individually and collectively.

In weighing competing policy considerations urged by the defendants, primary guidance is provided by the purpose of Title VII, namely to eradicate the existence and effects of discrimination in employment. Treatment and impact analyses are interpretive constructions intended to provide guidance in evaluating the evidence presented in discrimination cases so as best to effectuate Congressional intent. In this case, that intent is best realized by a decision to apply disparate impact analysis to subjective employment practices.

CONCLUSION

For the reasons discussed, we hold that disparate impact analysis can be applied to subjective employment practices. To the extent our prior decisions have held to the contrary they are expressly overruled.

We return this cause to the panel to reconsider the district court's disposition of the plaintiffs' claims in light of this decision.

SNEED, Circuit Judge, with whom Goodwin, Wallace, and Anderson, Circuit Judges, join, Concurring Separately:

I agree that en banc resolution of a conflict, such as existed with respect to *Heagney v. University of Washington*, 642 F.2d 1157 (9th Cir. 1981), and *Wang v. Hoffman*, 694 F.2d 1146 (9th Cir. 1982), is the appropriate means of unraveling a tangle of conflicting holdings in circuit law.

On the other hand, while I agree that the mere fact

that an employment practice is subjective does not shield it from attacks under the disparate impact theory, my view of the problems this case presents is different enough from that of the majority that it is best to set forth in some detail both my summary of the facts and my analysis of the law with respect to those facts. My thesis, in a nutshell, is that the disparate impact theory is designed to be applied to certain types of cases only. The majority opinion, although not holding otherwise, might unfortunately be read to suggest that the disparate treatment and disparate impact theories may be used interchangeably in any given fact situation. While this would read the opinion too broadly, it is certainly fair to say that the majority opinion provides no guidance in describing the circumstances to which each theory is applicable. This guidance is necessary to prevent the conversion of all, or substantially all, Title VII class actions into disparate impact cases.

I now turn to the facts which will be set out somewhat differently than in the majority opinion.

I.

FACTS

The five defendant canneries are located in remote and widely separated areas of Alaska. They operate for a short period each year, during the summer salmon runs, and lie vacant for the remainder of the year.

The cannery operations begin in May or June, a few weeks before the anticipated fish run, with a period known as the preseason. The companies bring in workers to assemble the canning equipment, repair winter damage

to the facilities, and prepare the cannery for the onset of the canning season. Shortly before the fishing season, the cannery workers arrive. Cannery workers, who comprise the bulk of the summer work force, generally are unskilled individuals who staff the actual canning lines. These workers remain at the cannery as long as the salmon run lasts; they are guaranteed payment for a minimum number of weeks if the run is shorter than usual. When the canning is completed, the cannery workers depart and the canneries are disassembled and winterized by postseason workers.

Salmon are extremely perishable and must be processed within a short time after being caught. Because the fish runs are of short duration, cannery work involves intense and long hours. The canning process proceeds as follows. Independent fishermen catch the salmon and turn them over to company-owned boats, which transport the fish from the fishing grounds to the canneries. Cannery workers eviscerate the fish, remove the eggs, clean the fish, and place them in cans. Next, the cannery workers cook the salmon under precise time and temperature requirements established by the Food and Drug Administration (FDA) and inspect the cans to ensure that proper seals are maintained on the top, bottom, and sides.

Because of their remote location, the canneries must be completely self-contained, employing individuals in a great variety of jobs. Machinists and engineers, for example, maintain the canning equipment. Quality control personnel conduct the FDA-required inspections and record-keeping. Boat crews operate transport boats. Other tasks require, for example, cooks, carpenters, storekeepers, bookkeepers, and beach gangs for dock yard

labor and construction. Because of the brevity of the salmon runs, most of the jobs are of short duration. The few permanent employees either staff the home offices in Seattle, Washington and Astoria, Oregon in the winter, or maintain the winter shipyard in Seattle.

Another consequence of the canneries' location in remote areas is that the companies hire the necessary employees from various areas -- primarily Alaska and the Pacific Northwest -- and transport them to and from the canneries each year. They provide housing and mess halls at the canneries throughout the season.

Most of the cannery worker jobs, which are unskilled, are held by minorities. Most of the higher-paying jobs are held by caucasians. The plaintiffs presented statistical evidence demonstrating the breadth of this disparity. Relying on this evidence, they challenged the following hiring practices the canneries use in filling the higher-paying jobs at issue: (1) the use of separate hiring channels and word-of-mouth recruitment for skilled workers; (2) nepotism; (3) rehire policies; and (4) the lack of objective job qualifications. They also alleged racial discrimination in the canneries' messing and housing practices.

The district court evaluated all of the practices under the disparate treatment model; it found for the defendants, holding that they had shown non-discriminatory motivations for these practices. It also evaluated some of the practices, those it characterized as "objective," under the disparate impact model; it found for the defendants under this analysis also.

The panel to which this case was assigned agreed with the district court that disparate impact analysis should be applied only to "objective" factors. Its conclusion was based on *Heagney v. University of Washington,* 642 F.2d 1157 (9th Cir. 1981), but conflicted with *Wang v. Hoffman,* 694 F.2d 1146 (9th Cir. 1982). *See Atonio v. Wards Cove Packing Co.,* 763 F.2d 1120, 1132 & n.6 (9th Cir. 1985).

As already mentioned, we granted en banc review to address the circumstances under which it is appropriate to employ the disparate impact analysis. Part II of this opinion sets forth an analytic framework for determining when the disparate impact approach should be used. Part III applies that framework to the facts of this case.

II.

ANALYTIC FRAMEWORK

The relevant section of Title VII, 42 U.S.C. §2000e-2(a)(2), provides:

> It shall be an unlawful employment practice for an employer . . .
>
> . . . to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

The Supreme Court's interpretation of this provi-

sion has identified two separate theories of recovery: disparate treatment and disparate impact. Put briefly, a plaintiff alleging disparate treatment must demonstrate intentional discrimination. *See e.g., International Bhd. of Teamsters v. United States,* 431 U.S. 324, 335 n.15 (1977). A disparate impact claim, on the other hand, does not require proof of discriminatory intent. Instead, it attacks "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another." *Id.* at 336 n.15.

The Supreme Court has not clearly articulated the types of cases to which each of these theories should be applied. In *Teamsters,* for example, the Court said that "[e]ither theory may, of course, be applied to a particular set of facts." *Id.* One could conclude from this comment that both theories were applicable to all Title VII claims without regard to their specific nature.

This conclusion, however, is plainly inconsistent with the Supreme Court's disposition of *Furnco Construction Corp. v. Waters,* 438 U.S. 567 (1978). In that case, the Supreme Court expressly refused to apply disparate impact analysis. The plaintiffs were individual bricklayers who were not hired because they applied at the jobsite, rather than through the regular application process. The Supreme Court's explanation consisted of a footnote stating that the case was not similar to *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971) (evaluating standardized tests under disparate impact analysis), *Dothard v. Rawlinson,* 433 U.S. 321 (1977) (evaluating height and weight requirements under disparate impact analysis), or *Teamsters* (a class-action disparate

treatment case). *See Furnco*, 438 U.S. at 575 n.7.[1]

It should not be surprising that the lower courts have employed different explanations of this footnote in *Furnco*. Two basic explanations have emerged, one represented by *Wang* and the other by *Heagney*. The *Heagney* approach restricts the disparate impact analysis to objective practices; the *Wang* approach applies it to all practices.[2] I think both of these approaches ignore how

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[1] Comprehension of the court's treatment of the impact claim in *Furnco* is complicated by Justice Marshall's explanation. He argues that the Court's rejection of the impact claim was merely an affirmance of the circuit court's affirmance of the district court's rejection of that claim on the merits. 438 U.S. at 584-85 (Marshall, J., concurring in part, dissenting in part.) Because this explanation is not consistent with the explanation of the Court's own opinion, I refuse to rely on it.

[2] The decisions in other circuits in fact reflect a more complicated situation, with a variety of different positions. It is fair to say, however, that some courts apply disparate impact analysis only to practices closely akin to the counting, measuring, and weighing evident from the existing Supreme Court cases. *See e.g., Carroll v. Sears, Roebuck & Co.*, 708 F.2d 183, 188-89 (5th Cir. 1983)(Wisdom, Jr.) (refusing to apply disparate impact analysis to claims of discrimination in training, promotion, and classification of employees); *Harris v. Ford Motor Co.*, 651 F.2d 609 (8th Cir. 1981)(per curiam) (refusing to apply disparate impact analysis to system allowing firing based on evaluations of supervisors). Other courts apply disparate impact analysis to any identifiable practice whatsoever. *See, e.g., Rowe v.*

the alleged practice functions. As a consequence, one is too broad and the other too narrow.

Moreover, the distinction between "objective" and "subjective" employment practices or criteria is not as clear as these cases suggest. A requirement, for example, that an applicant pass a qualifications test is "objective." On the other hand, hiring on the basis of good looks and appearance is by no means entirely "subjective." Specific aspects of these two criteria can be identified and to the extent so identified become "objective." Only an employment practice resting entirely on personal whim and caprice can be said to be wholly "subjective." In short, "subjective" and "objective" are only the extremes of a continuum, like night and day. I believe they are inappropriate tools for defining the bounds of disparate impact and disparate treatment analysis. Moreover, even "subjective" practices, as the majority points out, have the same capacity to cloak discrimination that in *Griggs* led the Supreme Court to create disparate impact analysis.

I think the key to understanding the proper spheres of disparate impact and disparate treatment analysis is found in the nature of the claims of discrimination. A brief recapitulation of the nature of the two forms of analysis demonstrates this point. To establish a prima facie

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Cleveland Pneumatic Co., 690 F.2d 88, 92-93 (6th Cir. 1982)(per curiam)(applying disparate impact analysis to system allowing rehiring based on opinions of foremen); *Clark v. Chrysler Corp.*, 673 F.2d 921, 927 (7th Cir.)(applying disparate impact analysis to word-of-mouth recruitment and discriminatory selection of hiring channel), *cert. denied*, 459 U.S. 873 (1982).

disparate impact case requires that the practice be identified, that there exists an impact adverse to a protected class, and that the practice caused the adverse impact.

Obviously, the burden of establishing this prima facie case will preclude certain claims from receiving disparate impact analysis. For example, the requirement that the plaintiffs identify a specific practice prevents plaintiffs from "launch[ing] a wide ranging attack on the cumulative effect of a company's employment practices." *Spaulding v. University of Washington*, 740 F.2d 686, 707 (9th Cir.)(quoting *Pouncy v. Prudential Insurance Co. of America*, 668 F.2d 795, 800 (5th Cir. 1982)), *cert. denied*, 105 S. Ct. 511 (1984). *But cf. Griffin v. Carlin*, 755 F.2d 1516, 1523-25 (11th Cir. 1985)(applying disparate impact analysis to the end result of a hiring process, without requiring the plaintiffs to articulate which specific practices caused the impact in question). Absent this requirement, the disparate impact test would put on employers the burden of demonstrating the business necessity of each facet of their employment decisions, even if the plaintiffs could demonstrate no disparate impact caused by some of those facets. *See Pouncy*, 668 F.2d at 801. Accordingly, the analysis requires the plaintiff to identify some specific practice; the defendant must show the business necessity of that specific practice.

The requirement of causation also prevents disparate impact analysis of certain claims. For example, a plaintiff's class consisting of children cannot state a cause of action against an employer merely because his recruiting practices designed to obtain quarry workers overlooked children. No significant number of children are qualified to be quarry workers. Because there are not a

significant number of children so qualified, the employer's practices in recruiting quarry workers cannot be said to have caused any impact on the children. At a minimum, then, the causation element requires demonstration by the plaintiff that significant numbers of the plaintiff class are qualified for the job. *See e.g., Segar v. Smith,* 738 F.2d 1249, 1274 (D.C. Cir. 1984), *cert. denied,* 105 S. Ct. 2357 (1985); *Grant v. Bethlehem Steel Corp.,* 635 F.2d 1007, 1019 (2d Cir. 1980)(noting that some members of the plaintiff class were clearly qualified, despite the employers' protestations to the contrary), *cert. denied,* 452 U.S. 940 (1981).[3]

Once the plaintiff has established a prima facie case, the employer must either attack one of the three elements of the prima facie case or demonstrate that the practice is a "business necessity." The latter can be shown only when the practice is job-related and serves to help identify the qualities necessary to perform the work satisfactorily. *See, e.g., Dothard v. Rawlinson,* 433 U.S. 321, 332 n.14 (1977); *Griggs v. Duke Power Co.,* 401 U.S. 424, 431

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[3] I do not mean to say that plaintiffs must introduce statistical proof based on qualifications of applicants who have been rejected for the job. Obviously the applicant pool itself could fail to represent adequately the number of qualified minorities because of discriminatory recruitment practices. *See e.g., Dothard v. Rawlinson,* 433 U.S. 321, 330 (1977). Those discriminatory recruitment practices themselves are subject to disparate impact analysis. But it is important to remember that a prima facie case that the recruitment practices in question have caused a disparate impact requires demonstration of a significant number of qualified persons overlooked because of the challenged practices.

(1971).

The disparate treatment structure is quite different. There the prima facie case typically requires that the aggrieved show (1) that he is a member of a protected class, (2) that he applied, (3) that he was rejected, and (4) that after the rejection the position remained open and applicants having qualifications similar to the aggrieved's continued to be accepted. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The burden then is on the employer to show that a non-discriminatory reason explains his conduct. *See id.* at 802-03. Thereafter, the aggrieved may attempt to show that the preferred explanation is pretextual. *See id.* at 804. The ultimate burden of persuasion remains on the aggrieved to show discriminatory treatment. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

The Supreme Court cases to date have applied disparate impact analysis only to practices akin to counting, weighing, and measuring, an even narrower limitation than the "objective"/"subjective" distinction some courts have adopted. I think the appropriate distinction can be more accurately delineated. As I see it, disparate impact analysis should be applied whenever the plaintiff claims that the employer has articulated an unnecessary practice that makes the plaintiff's true qualifications irrelevant. This differs from a treatment case, in which the plaintiff claims that, knowing the plaintiff's qualifications, the employer refused to hire him because of race or some other impermissible characteristic. A showing of discriminatory intent is extremely difficult, if not impossible, when an employer asserts that he did not hire an individual because of a facially neutral requirement. Faced with

this reality the Court in *Griggs* held that employers must justify such requirements under the business necessity test.

The crucial issue in any Title VII case is into which category the employer's alleged wrong properly fits. Has the employer allegedly failed by reason of some facially neutral employment practice to ascertain the qualifications of a protected class, or has the employer ignored the known qualifications for a discriminatory reason? The nature of the wrong as pleaded and proved determines the nature and extent of the plaintiff's burden. Because it would be futile in an impact case to require the plaintiff to show discriminatory intent, the plaintiff's burden principally is one of showing the "impact" of the practice. Proof of the "impact" goes far toward establishing a failure to consider the qualifications of a substantial number of the protected class. At that point the employer's response logically can only be that the practice serves to ascertain a relevant job-related qualifications; that is, the practice rests on business necessity.

This burden of showing a business necessity has no place if the plaintiff's grievance is that his qualifications, although available to and known by the defendant employer, have been ignored because of a discriminatory motive. To treat this as an impact case rather than a treatment case would relieve the plaintiff of the burden of establishing a discriminatory intent and impose on the defendant the burden of demonstrating that what he did was done because of business necessity. In the context of a treatment case, this would amount to imposing the burden on the defendant to prove that he did not discriminate.

Thus, it is necessary to determine from the

pleadings and the evidence the nature of each claim the plaintiff makes. Although it is true that neither impact nor treatment analysis can be tied irrevocably to a specific category of practices, it is also true that they properly cannot be employed interchangeably. It follows that in this case each claim must be analyzed to determine which type of analysis, impact or treatment, is proper. An employee, alleging only that the employer's failure to hire him is based on race or religion, cannot force the employer to prove that his failure was due to business necessity. This remains true even if the plaintiff shows that others of plaintiff's race or religion also had not been hired. The employee has alleged a treatment case and the burdens are allocated as *McDonnell Douglas* and *Burdine* indicate. On the other hand, such an allocation is entirely inappropriate where the allegation is that the test employed by the employer disqualifies all applicants other than Protestants. This pleads an impact case.

Complications arise when the practices lend themselves to being alleged as the basis of either a treatment or impact case. Equally complicated are situations in which multiple practices are employed and some properly suggest impact analysis while others treatment analysis. In such situations, a court should evaluate each practice separately, applying the appropriate analysis to each practice. Guided by this analysis, I now proceed to examine the district court's treatment of the plaintiff's claims in this case.[4]

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[4] I acknowledge that this position has not been articulated in the decisions of other courts that have examined similar questions. A brief survey of the law in other circuits reveals, however, that most of the decisions

in this area are consistent with the approach I suggest.

The Second Circuit has applied disparate impact analysis to employment systems that relied on subjective employee evaluations. *Zahorik v. Cornell Univ.*, 729 F.2d 85, 95-95 (2d Cir. 1984). Under my approach, such decisions would often be subject to the disparate impact analysis.

The Third Circuit applied disparate impact to invalidate a test that partially based promotions on administrative skills. In that case, the employer had a practice of assigning whites to jobs that developed the administrative skills tested for by the exam. Accordingly, reliance on the administrative skills was improper. *See Wilmore v. City of Wilmington*, 699 F.2d 667, 675 (3rd Cir. 1983).

None of the Fourth Circuit decisions commonly cited in this area seems to have dealt specifically with the objective/subjective distinction. For instance, in *EEOC v. Federal Reserve Bank*, 698 F.2d 633, 638-39 (4th Cir. 1983), *rev'd on other grounds sub nom. Cooper v. Federal Reserve Bank*, 467 U.S. 867 (1984), the court flatly stated that disparate impact analysis could be applied only to objective practices. In that case, however, the plaintiffs apparently identified no specific practice; instead, they seem to have been challenging the entire employment process. I would reach the same result, refusing to apply disparate impact unless the plaintiffs can identify a specific practice that causes a disparate impact. Similarly, *Pope v. City of Hickory*, 679 F.2d 20 (4th Cir. 1982), was a disparate treatment case; the plaintiffs alleged discrimination in

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general, not that it was implemented through some specific practice. *Brown v. Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir.), *cert denied*, 409 U.S. 982 (1972), failed to distinguish between the impact and treatment analysis at all. *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert. dismissed pursuant to Sup. Ct. R. 60*, 404 U.S. 1006 (1971), is actually precedent for application of disparate impact analysis to more subjective systems, despite the flat statement in *EEOC*. In *Robinson*, the Fourth Circuit applied disparate impact to use of a seniority system that was at least partially subjective.

The decisions in the Fifth Circuit display a similar lack of resolution in drawing a line between objective and subjective practices. Several panels of that circuit have thought that the law of the circuit precluded application of the disparate impact analysis to subjective factors, relying on *Pouncy v. Prudential Ins. Co. of Am.*, 668 F.2d 795 (5th Cir. 1982). *See Vuyanich v. Republic Nat'l Bank*, 723 F.2d 1195, 1201-02 (5th Cir.), *cert. denied*, 105 S. Ct. 567 (1984); *Carroll v. Sears, Roebuck & Co.*, 708 F.2d 183, 188-89 (5th Cir. 1983) (Wisdom, J.); *Pegues v. Mississippi State Employment Serv.*, 699 F.2d 760, 764 (5th Cir.), *cert. denied*, 464 U.S. 991 (1983). But at least one recent Fifth Circuit panel noted *Pouncy* and went on to apply disparate impact analysis to a system that based promotions on the subjective evaluations of foremen. *See Page v. U.S. Indus.*, 726 F.2d 1038, 1045-46 (5th Cir. 1984). The clarity of the ostensible rule of *Pouncy* is also not evident from that opinion itself. In fact, the opinion had alternative holdings; first, that the plaintiffs had not established that the practices caused the impact; and, second, that the practice

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was not susceptible to the disparate impact analysis because of its subjectivity. 668 F.2d at 800-01. I also note that in none of the Fifth Circuit cases following *Pouncy* would plaintiffs clearly have prevailed under my disparate impact analysis anyway. *See Vuyanich* (plaintiff apparently failed to identify a specific practice); *Carroll* (apparently the plaintiffs failed to show causation); *Pegues* (practice not by an employer, but by a state employee commission).

In the Sixth Circuit, disparate impact analysis has been applied in cases challenging rehiring based on unguided opinions of foremen. *See Rowe v. Cleveland Pneumatic Co.*, 690 F.2d 88, 92-93 (6th Cir. 1982) (per curiam).

The Seventh Circuit, in a case strikingly similar to this one, applied disparate impact analysis, as I do here, to word-of-mouth recruitment and selection of hiring channels. *See Clark v. Chrysler Corp.*, 673 F.2d 921, 927 (7th Cir.), *cert. denied*, 459 U.S. 873 (1982).

In the Eighth Circuit, I do find cases that are not reconcilable with my approach. That circuit has maintained a firm refusal to apply disparate impact analysis to what it characterizes as "subjective" practices. *See, e.g., Gilbert v. Little Rock*, 722 F.2d 1390 (8th Cir. 1983)(applying treatment analysis to a system relying on individual discretion), *cert. denied*, 466 U.S. 972 (1984); *Talley v. United States Postal Serv.*, 720 F.2d 505, 506-07 (8th Cir. 1983) (refusing to apply impact analysis), *cert. denied*, 466 U.S. 952 (1984); *Harris v. Ford Motor Co.*, 651 F.2d 609 (8th Cir. 1981)(per curiam) (same). For the

reasons articulated in the text, I think these cases are incorrect. I note that this footnote demonstrates that my approach is consistent with the great majority of existing authority.

The Tenth Circuit has uniformly applied disparate impact analysis to practices that use subjectivity to cloak discrimination. *See e.g., Hawkins v. Bounds,* 752 F.2d 500, 503 (10th Cir. 1985); *Lasso v. Woodmen of the World Life Ins. Co.,* 741 F.2d 1241, 1245 (10th Cir. 1984), *cert. denied,* 105 S. Ct. 2320 (1985); *Coe v. Yellow Freight Sys.,* 646 F.2d 444, 450-41 (10th Cir. 1981)(dicta); *Williams v. Colorado Springs, Colo. School Dist. No. 11,* 641 F.2d 835 (10th Cir. 1981).

I have already noted the inconsistency of one recent Eleventh Circuit decision with my opinion. *See Griffin v. Carlin,* 755 F.2d 1516, 1523-25 (11th Cir. 1985)(applying disparate impact analysis to the end result of a hiring process without requiring the plaintiffs to identify a particular practice). That disagreement as to the requirements of the prima facie case does not extend, however, to the scope of the impact analysis itself. I would apply impact analysis to the facts of *Griffin,* only reaching a different result.

Finally, the D.C. Circuit has recently articulated a complicated position, not completely in accord with either of the common positions exhibited in the other circuits. *See Segar v. Smith,* 738 F.2d 1249, 1270-72 (D.C. Cir. 1984), *cert. denied,* 105 S. Ct. 2357 (1985). In that opinion, the panel discussed the following scenario. After a plaintiff establishes a prima facie treatment case, defendants frequently advance an employment practice as a legitimate

III.

APPLICATION TO THIS CASE

A. Separate Hiring Channels and Word-of-Mouth Recruitment

The first practice the plaintiffs challenge is the use of separate hiring channels and word-of-mouth recruitment for cannery workers and for the skilled at-issue jobs. The use of separate hiring channels can insulate an employer's decision-making process from any need to consider the qualifications of unwanted minorities. Accordingly, disparate impact analysis of this claim is appropriate.[5]

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reason for their hiring decisions. According to the *Segar* panel, the employers' articulation of that practice as a defense to the *treatment* case establishes a prima facie *impact* case against the practice in question. Accordingly, the defendants must defend the practice under the business necessity test required by disparate impact analysis.

[5] I recognize that this claim is quite similar to the claim presented in *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), a claim to which the Court refused to apply disparate impact analysis, *id.* at 575 & n.7. In that case, the Court emphasized the "importance of selecting people whose capability has been demonstrated to defendant." *Id.* at 574 (quoting the lower court opinion). If this were treated as a job qualification, under my analysis the impact analysis would apply, but the plaintiffs would have failed to establish a prima facie case because they were not qualified. Most importantly, however, the *Furnco*

But this does not mean that Atonio's claim must prevail. As part of his prima facie case, he must establish causation. In turn, that element requires proof that a substantial number of the class possess the qualifications legitimately required for the skilled jobs. The district court did not make any findings on this point. Because the record is unclear, I would remand for further factfinding on this point. *See Icicle Seafoods, Inc. v. Worthington,* 106 S. Ct. __, __ (1986). For each job that the district court finds a substantial number of qualified plaintiffs, the district court must evaluate the business necessity of separate hiring channels.

B. Nepotism

The second hiring practice the employees challenge is nepotism. The district court subjected this claim to impact analysis, pursuant to our decision in *Bonilla v. Oakland Scavenger Co.,* 697 F.2d 1297, 1303-04 (9th Cir. 1983), *cert. denied,* 467 U.S. 1251 (1984). It rejected the claim, finding that the individuals were hired because of their abilities rather than their relation to the employers. Excerpt of Record (E.R.) at 324-25. I might construe this as a finding that the canneries had no practice of nepotism, apart from their admitted practice of word-of-mouth recruitment. If this were so, the plaintiffs' challenge would fail. Because the appropriate legal standard was less than clear at the time the district court considered this case, I would remand this claim back to that court for further

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footnote is just not specific enough to resolve the question before us. I do not think it is useful to search at length for an explanation for the *Furnco* result the Court declined to give us.

consideration.

C. Rehire Policies

The third practice the employees challenge is the rehire policies of the employers. Like the practices discussed above, rehire policies insulate the employer from the need to consider the applications of possibly qualified minorities. The district court properly applied disparate impact analysis to this practice, but rejected the employees' challenge because it found the practice was justified by business necessity, *viz.* the short season and the dangers of the industry. E.R. at 334. Because this finding is not clearly erroneous, I would affirm the district court's disposition of this claim without addressing other aspects of it.

D. Lack of Objective Employment Criteria

Next, the employees challenge the employers' lack of objective employment criteria. The district court found as a fact that the employers did have objective criteria. The defendants' pretrial order listed a number of qualifications assertedly necessary for the jobs in question. After hearing the evidence, the court explicitly found that these qualifications were "reasonably required for successful performance." E.R. at 299. Although some evidence in the record suggests that these qualifications were not applied evenhandedly, discrimination in application raises a treatment claim. It is only the choice of qualifications that is subject to disparate impact analysis. I cannot say that the district court's decision was clearly erroneous. Accordingly, I would affirm its disposition of this claim.

E. Housing and Messing Practices

Finally, the employees allege racial discrimination in the canneries' housing and messing practices. I do not think this claim is properly susceptible to disparate impact analysis. In no way do these practices enable an employer to reject prospective minority employees without considering their qualifications. The only Title VII challenge to these practices can be under the disparate treatment theory. The district court's rejection of the claim on that theory, E.R. at 336-37, was not clearly erroneous. Accordingly, I would affirm the district court's treatment of this claim.

In summary, I would affirm the district court's dismissal of the plaintiffs' claims regarding rehire policies, subjective employment criteria, and racial discrimination in housing and messing practices. I would reverse the district court's dismissal of the separate hiring channels and nepotism claims and would remand for further factfinding.

FILED
November 19, 1985

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK ATONIO, EUGENE BACLIG, RANDY del FIERRO, CLARKE KIDO, LESTER KURAMOTO, ALAN LEW, CURTIS LEW, ROBERT MORRIS, JOAQUIN ARRUIZA, BARBARA VIERNES, as administratrix of the estate of Gene Allen Viernes, and all others similarly situated,	)	No.83-4263, 84-3527
Plaintiffs-Appellants,	)	ORDER
vs.	)	
WARDS COVE PACKING COMPANY, INC., CASTLE & COOKE, INC., and COLUMBIA WARDS FISHERIES,	)	
Defendants-Appellees.	)	

Before: BROWNING, Chief Judge, GOODWIN, WALLACE, SNEED, KENNEDY, ANDERSON, HUG, TANG, SKOPIL, SCHROEDER, FLETCHER, FARRIS, PREGERSON, ALARCON, POOLE, FERGUSON, NELSON, CANBY, BOOCHEVER, NORRIS, REINHARDT, BEEZER, HALL, WIGGINS, and BRUNETTI, Circuit Judges.

Upon a vote of the majority of the regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Rule 25 of the Rules of the United States Court of Appeals for the Ninth Circuit. The previous three-judge panel assignment is withdrawn.

/s/ James R. Browning
Chief Judge

FILED
August 15, 1985

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK ATONIO, EUGENE BACLIG, RANDY DEL FIERRO, CLARKE KIDO, LESTER KURAMOTO, ALAN LEW, CURTIS LEW, ROBERT MORRIS, JOAQUIN ARRUIZA BARBARA VIERNES, as administratrix of the estate of Gene Allen Viernes, and all others similarly situated,	)	NOS. 83-4263 84-3527
	)	D.C. No. CV 74-145 JLQ
	)	OPINION
Plaintiffs-Appellants,	)	
v.	)	
WARDS COVE PACKING COMPANY, INC., CASTLE COOK, INC., and COLUMBIA WARDS FISHERIES,	)	
Defendants-Appellees.	)	

Appeal from the United States District Court for
the Western District of Washington
The Honorable Justin L. Quackenbush,
District Judge, Presiding
Argued and Submitted February 6, 1985
Seattle, Washington

Before: CHOY, ANDERSON, and TANG, Circuit Judges.
J. BLAINE ANDERSON, Circuit Judge:

The named plaintiffs in this class action suit are former employees at several salmon canneries in Alaska. They brought this action against their former employers, Wards Cove Packing Company, Inc. ("Wards"), Castle & Cooke, Inc. ("Castle"), and Columbia Wards Fisheries ("Columbia"), charging employment discrimination on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981. The class is defined as all nonwhites who are now, will be, or have been at any time since March 20, 1971, employed at any one of five canneries. The individual canneries under scrutiny are Wards Cove and Red Salmon (operated by Wards), Bumble Bee (operated by Castle), and Ekuk and Alitak (run by Columbia).

The Title VII claims against Wards and Columbia were dismissed for lack of jurisdiction early in the proceedings. This court affirmed the dismissal as to Columbia, but reversed the decision as to Wards. *Atonio v. Wards Cove Packing Co., Inc.*, 703 F.2d 329 (9th Cir. 1983). On remand, and following a bifurcated liability trial, the

district court held for defendants. The class appeals.

BACKGROUND

The five canneries are located in remote and widely separated areas of Alaska. They only operate for a short period each year, during the summer salmon runs. For the remainder of the year they lie vacant. The salmon runs themselves are inherently unpredictable. Due to this fact, the number of canning lines to operate at each facility may vary from year to year, and in any given year a particular facility may not operate at all. Correspondingly, the number of employees needed to staff a particular cannery in any given year varies with the size of the salmon run. As early and as much as possible each winter, the companies attempt to gauge the size of the anticipated fish run for the upcoming season, and likewise the number of employees that will be needed. In making this assessment, management relies in part on forecasts provided by the Alaska Department of Fish and Game and the Fisheries Research Institute at the University of Washington. Despite these efforts, the actual fish run frequently varies to a considerable degree from the forecasts.

Each year the actual cannery operations begin in May or June, a few weeks before the anticipated fish run, with a period known as the preseason. Workers are brought in to assemble the canning equipment, repair the facilities from the winter damage, and generally prepare the entire cannery for the onset of the canning season. The district court found that many preseason job positions require a variety of skills and skill levels, and that there is too little time during the preseason to train unskilled workers for the skilled jobs.

Shortly before the fishing begins, the cannery workers arrive. Cannery workers, who comprise the bulk of the summer work force, are the individuals who staff the actual canning lines. The cannery worker position is unskilled. These workers remain at the cannery as long as the salmon run produces fish to be canned, and they are guaranteed payment for a minimum number of weeks if the run proves to be a short one. In turn, when the canning is completed, the cannery workers depart and the canneries are disassembled and winterized by postseason workers.

Salmon are extremely perishable and must be processed within a short time after being caught. Since the fish runs themselves are of short duration, cannery operations are often characterized by intense work and long hours. All the while, the Food and Drug Administration monitors the canning process closely, to ensure a safe consumer product. Basically, the canning process proceeds as follows. Independent fishermen catch the salmon and turn them over to company-owned boats called "tenders," which transport the fish from the fishing grounds to the canneries. Once at the cannery, the fish are eviscerated, the eggs pulled, and they are cleaned. Then, operating at a rate of approximately four cans per second, the salmon are filled into cans. Next, the canned salmon are cooked under precise time/temperature requirements established by the FDA, and the cans are inspected to ensure that proper seals are maintained on the top, bottom and sides.

In addition to the cannery workers, each cannery staffs a variety of job classifications. Machinists and engineers are hired to maintain the smooth and continuous operation of the canning equipment. Quality control

personnel conduct the FDA-required inspections and recordkeeping. Tenders are staffed with a crew necessary to operate the vessel. A variety of support personnel are employed to operate the entire cannery community, including, for example, cooks, carpenters, store-keepers, bookkeepers, beach gangs for dock yard labor and construction, etc. The nature of the industry is such that most of the jobs are seasonal and of short duration. The few employees that can be considered permanent or year-round consist of certain management and office personnel who staff the home offices in Seattle and Astoria, Oregon in the winter, and several machinists, carpenters and tendermen who maintain the winter shipyard in Seattle. The remainder of the employees needed for the summer canning season are hired beginning in the first few months of each year.

Due to the geographical realities, the companies must hire the necessary employees from various areas, primarily Alaska and the Pacific Northwest. Nearly all employees are transported to and from the canneries by the companies each year, where they are housed and fed throughout the season. A few Alaska Native employees are able to reside in villages located near some canneries.

During their tenure, the appellants were primarily employed as cannery workers, the lowest-paid positions at the canneries. Appellants' discrimination complaints center on the fact that nearly all cannery worker positions are filled by nonwhites, while the higher-paying job classifications are predominantly white. This disparity, appellants allege, is due to hiring and promoting practices that allow intentional discrimination and produce a discriminatory impact as well. To illustrate these charges, appellants

launched a wide-scale attack on the employee selection methods and the housing and messing practices used by the companies.

Along the practices challenged is the apparent lack of objective qualifications for many job classifications, and the use of subjective criteria in hiring and promoting. When filling most job positions, the respective hiring officers generally seek to hire the individuals who are, in the hiring officer's opinion, the best for the job. Each different job classification naturally requires the officer to consider the needs peculiar to that job. The district court found that the various job classifications at the cannery are not fungible, and that the most important qualifications for many of them, excluding cannery worker positions, are skill and/or experience. The court also found that the necessary skills are not readilyacquirable during the season, primarily due to the time restrictions involved, and that cannery worker jobs do not provide training for other positions. Further, the district court found that preseason availability is a necessary qualification for many of the positions, but that it is never a requirement for cannery worker jobs.

The appellants also attacked the recruitment of employees for different jobs through separate channels. The great majority of cannery workers are hired from native villages in Alaska and through a primarily Filipino ILWU local in Seattle. Consequently, the cannery worker department is staffed almost entirely by these ethnic groups. Openings in other positions are not posted at the canneries, and the companies do not promote from within during the season. Instead, the companies fill other positions each year through applications received during

the offseason at the mainland home offices, through re-hiring previous employees in those positions, and through word-of-mouth recruitment. Appellants also allege that nepotism is rampant in the canneries, with relatives of white company employees being given preference in hiring. Finally, appellants allege that nonwhites are segregated from whites in housing and messing, and that the bunkhouses and food provided for the nonwhites is far inferior to that provided for whites.

In holding for the defendant companies, the district court evaluated the mass of evidence introduced by both sides, including conflicting statistical data. The court analyzed all of appellants' claims for intentional discrimination, concluding that the companies had successfully shown nondiscriminatory motivations. The court refused, despite appellants' arguments to the contrary, to evaluate all of the claims under the disparate impact model of Title VII, relying on authority from this circuit. A few claims were subjected to disparate impact scrutiny, however, and the court again found for the defendants. Before this court, the appellants challenge these findings and raise a host of subsidiary issues.

ANALYSIS

I. Columbia Joint Venture Claims

Wards and Castle operate Columbia as a joint venture. Earlier in these proceedings, we affirmed the dismissal of Title VII claims against Columbia because they were not filed within the prescribed time limits and were, therefore, timebarred. *See Atonio v. Wards Cove Packing Co., Inc.*, 703 F.2d 329, 332 (9th Cir. 1983).

Appellants now assert that dismissal of the claims against the joint venture for procedural reasons does not affect the liability of the joint venturers as to those claims. Therefore, argue appellants, because they could have sued either or both of the joint venturers without suing the joint venture, the Title VII claims against Columbia can be asserted against Wards and Castle, both of which were timely sued on separate discrimination charges.

We have no trouble agreeing that general common law agency principles, including joint and several liability, are applicable in Title VII cases. So too, however, are basic procedural and jurisdictional principles applicable. The controlling fact here, which appellants ignore, is that the Title VII claims against Columbia were not filed in time to grant jurisdiction. Nor were they ever filed against Wards or Castle in their capacity as joint venturers for Columbia. The claims were properly dismissed as untimely, and they simply no longer exist. Appellants cannot now evade the jurisdictional prerequisites by bringing these claims in through the back door.

II. Intentional Discrimination

The district court correctly recognized that while a plaintiff suing under section 1981 must always prove intentional discrimination, such is not always the case with Title VII. Of the two Title VII theories of liability, only disparate treatment requires a showing of intentional discrimination in order to establish a *prima facie* case. The alternate theory, disparate impact, requires no proof of intent and, logically enough, good intent is not a defense in impact cases.

Due to their inherent similarities, we can treat section 1981 and Title VII disparate treatment under one intentional discrimination analysis. The plaintiff in such a case has the initial burden of proving a *prima facie* case of intentional discrimination. If successful, the burden of production then shifts to the defendant to articulate some legitimate nondiscriminatory reason for the plaintiff's rejection. If the defendant carries this burden, the plaintiff can still prove by a preponderance of the evidence that the legitimate reasons offered were a pretext for discrimination. The plaintiff always has the burden of persuasion. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 252-256, 67 L. Ed. 2d 207, 215-217, 101 S.Ct. 1089 (1981); *Kimbrough v. Sec. of U.S. Air Force,* No. 83-3697, slip op. at 7 (9th Cir., June 28, 1985). In practical application, this allocation of burdens works to the effect that "after plaintiff's *prima facie* case and defendant's 'articulation,' the trier of fact decides the question of discrimination based on the entire case." *Kimbrough,* slip op. at 8.

"After a Title VII case is fully tried, we review the decision under the clearly erroneous standard applicable to factual determinations." *Kimbrough,* slip op. at 4; *Anderson v. Bessemer City,* ___ U.S. ___,___, 84 L. Ed. 2d 518, 528 (1985). The "'district court must decide which party's explanation of the employer's motivation it believes.' We will reverse that factual determination only if it is clearly erroneous . . . and we will not ransack the record, searching for mistakes." *Casillas v. United States Navy,* 735 F.2d 338, 342-343 (9th Cir. 1984) (quoting *United States Postal Service v. Aikens,* ___U.S.___, 75 L. Ed. 2d 403, 103 S.Ct. 1478 (1983)).

Before addressing appellants' several allegations of

error, it should be noted that appellants have relied heavily on this circuit's decision in *Domingo v. New England Fish Co.*, 727 F.2d 1429 (9th Cir. 1984), *modified*, 742 F.2d 520 (1984). *Domingo* was originally brought as a companion case to the action at bar. Because of pre-trial delays in the instant action, including the earlier appeal, *Domingo* proceeded to trial and appeal much faster. The facts in *Domingo* are strikingly similar to the facts at bar, as are the claims of the plaintiffs. Both cases involve racial discrimination charges in the Alaska canning industry. *Domingo* resulted in a decision in favor of the class, and the present plaintiffs have cited that decision extensively. We do not, however, feel compelled to blindly apply *stare decisis*. Although the similarities between the cases are striking, the differences between them are far more determinative.

In *Domingo*, we noted that the liability phase of the trial lasted one and one-half days, with the defendant company not challenging the plaintiffs' statistics nor rebutting the plaintiffs' *prima facie* case. 727 F.2d at 1433-1434. In essence, the defendants in *Domingo* did not defend against the allegations of discrimination. Conversely, the defendants at bar are different canning companies and they have defended themselves against these charges vigorously. The liability phase of the trial took twelve days, with the defense introducing witnesses and statistical evidence contrary to that of the plaintiffs. Taking these important factual differences into consideration, *Domingo* is entitled to no more or no less precedential value than the many other Ninth Circuit cases in this area of law.

A. Hiring, Promoting, Paying, Firing

When confronting the bevy of evidence below, the district court began its intentional discrimination inquiry by dividing the at-issue (non-cannery worker) jobs into two groups: skilled and unskilled. Both the plaintiffs and defendants had introduced labor-market statistics in an effort to bolster their contentions. For reasons discussed below, the district court rejected plaintiffs' labor-market statistics, while crediting those of defendants. In addition, the plaintiffs introduced comparative statistics, which the court only credited in scrutinizing the unskilled jobs group.

Taking each group in turn, the court first found that the unskilled Jobs were fungible, and, thus, comparative statistics were appropriate for use in establishing a *prima facie* case of discrimination. Since the comparative statistics showed a pattern of job segregation throughout the cannery work forces, the court found that the plaintiffs had put on a *prima facie* case with respect to the unskilled jobs. Nevertheless, for reasons discussed below, the court found that defendants had met their burden of production in showing motivation other than discriminatory animus, and that plaintiffs had failed in their ultimate burden of proving pretext.

Moving on to the skilled positions, the district court had more difficulty in finding a *prima facie* case of intentional discrimination, because the plaintiffs' statistical evidence had been discredited. The court did find a "marginal" *prima facie* case, but only by way of combining all of plaintiffs' evidence and claims of nepotism, individual instances of alleged discrimination, deterrence, failure to post openings, general lack of objective qualifications, lack

of a formal promotion procedure, re-hiring past employees in their old jobs, and the discredited statistical evidence. The court found that none of these had significant probative value when considered alone. In conclusion, the court held that defendants had met their burden of production and that plaintiffs had failed to meet their ultimate burden of persuasion.

Appellants contend that the district court erred in not giving more credit to their evidence of nepotism. The district court noted that "[r]elatives of whites and particularly non-whites appear in high incidence at the canneries. However, defendants have established that the relatives hired in at-issue jobs were highly qualified for the positions in which they were hired and were chosen because of their qualifications." The court also found that plaintiffs' statistics failed to recognize that a number of persons became related through marriage after starting work at the canneries, and that the testimony showed "that numerous white persons who 'knew' someone were not hired due to inexperience, and whites hired were paid no more than non-whites." Therefore, the court concluded that there existed no "preference" for relatives at the canneries.[1]

After carefully reviewing the record, we cannot say that the district court was clearly erroneous in making these findings. The Supreme Court has recently reiterated our role in reviewing these findings of fact. "If the district

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[1] The district court's analysis of appellants' nepotism claims applies equally under both the disparate impact and intentional discrimination inquiries. Disparate impact is discussed infra.

court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them *cannot be clearly erroneous." Anderson v. Bessemer City,* 84 L. Ed. 2d at 528 (emphasis added). The fact finder's account of the evidence, concluding that there were legitimate and nonpreferential reasons for the hires of friends and relatives, is entirely plausible in light of the whole record. Consequently, we will not disturb it.

For the same reasons, we will not overturn the district court's findings with respect to alleged individual instances of discrimination. A number of plaintiffs alleged that they were either overtly discriminated against in the hiring for at-issue positions, or that they were deterred from seeking at-issue positions because of the defendants' alleged history of pervasive discrimination. Using the four-part test of McDonnell Douglas as a guideline,[2] the

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[2] It was set out in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 36 L.Ed.2d 668, 677, 93 S.Ct. 1817, 1824 (1977), that a plaintiff can establish an inference of discrimination by meeting four criteria. First, that the individual belongs to a Title VII protected class. Second, that he or she applied and was qualified for an open position. Third, that he or she was rejected. Finally, that after the rejection, the employer continued to seek applicants. See also, *Diaz v. American Telephone & Telegraph,* 752 F.2d 1356, 1?59 (9th Cir. 1985).

Appellants accuse the district court of misapplying

district court did not give greater credit to the alleged instances because it found that the respective plaintiffs had not been hired for nondiscriminatory reasons. Primarily, the district court found that the individuals had made oral inquiries, which were not considered applications, or that the applications were untimely.[3] The court also found that some applicants had been unavailable for preseason work and, therefore, unavailable for the positions they desired. There is ample evidence in the record to support the district court's findings regarding these individual claims.

Nevertheless, appellants argue that the fact that the companies use separate hiring channels, word-of-mouth

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the test, by using it too stringently. They are incorrect, apparently due to a misreading of the court's opinion. Contrary to the accusation, the court clearly said that the *McDonnell Douglas* elements are not an inflexible formulation, but rather provide some guidance.

[3] Applications could be untimely if made too early or too late. Testimony showed that some plaintiffs had orally inquired during one season about positions for the next season a year away, and such inquiries were not considered anapplication unless followed up by a written application to the home office during the winter. Conversely, because the companies generally received far more applications than there were job vacancies, an application was untimely if received after the opening was filled. The district court found that the defendants did not treat whites and nonwhites differently in these respects.

recruitment, and fail to announce vacancies should serve to excuse appellants from the necessity of establishing the timeliness of their applications and automatically elevate oral inquiries to the status of applications. We disagree. Appellants take this idea from a discussion of damages issues in *Domingo.* 727 F.2d at 1445. We find that discussion inapposite because, unlike the *Domingo* plaintiffs, the appellants have not first established wide-ranging discrimination. Appellants failed to convince the district court that they had been intentionally discriminated against, and they may not rely on *Domingo* in this manner to establish what they have failed to prove. We cannot find the district court clearly erroneous.

Appellants also contend that the district court erred in failing to credit their comparative statistics when analyzing the skilled positions. As previously indicated, the district court accorded these statistics, which compare the racial composition of the various job categories, little probative value because they did not reflect the number of employees possessing the requisite skills or those available for preseason work.

This court has recognized the importance of statistics as circumstantial evidence of discriminatory intent. In the same breath, however, the court often admonishes that statistics are "inherently slippery" and the weight given to them depends on "proper supportive facts and the absence of variables." *Spaulding v. University of Washington,* 740 F.2d 686,703 (9th Cir.), *cert. denied,* 105 S. Ct. 511 (1984) (quotations omitted). The district court's evaluation of conflicting statistics and determination of the probative weight they are to be accorded is a factual inquiry. Accordingly, we apply the clearly erroneous

standard of review. *Gay v. Waiters' and Dairy Lunchmens Union.* 694 F.2d 5?1, 550 (9th Cir. 1982); *see also Allen v. Prince George's County, Md.*, 737 F.2d 1299, 1303 (4th Cir. 1984).

Appellants fail to recognize the importance of minimizing variables to increase the reliability and significance of statistical evidence. In *Domingo,* we said that "[i]n many cases, it is necessary to consider the qualifications of the applicant pool because without that information, no inference of discrimination may be drawn; the lack of minority representation in the workforce might simply be due to a lack of qualified applicants." 727 F.2d at 1436. Although we permitted the *Domingo* district court to credit comparative statistics in that case, it was because sufficient evidence of discriminatory treatment had already been presented, and the statistics were not necessary to raise an inference of discrimination. We allowed them merely to demonstrate the consequences of the defendant's already-proven discriminatory hiring practices.

The appellants at bar, however, have not previously presented sufficient evidence of discriminatory intent, and they desperately need these comparative statistics credited for that very purpose. This is a precise example of the type of putting the cart in front of the horse of which we were wary in *Domingo.* Appellants cannot use these general, unrefined statistics to meet their burden with respect to skilled positions. This case clearly illustrates why courts and litigants must carefully examine proffered statistics to avoid the distortion of fact that they have the potential to produce.

The percentage of nonwhites employed in the

Alaska salmon canning industry during the relevant time period was approximately 50 percent. Of these, approximately 88 percent were Alaska Natives or of Filipino descent. It is undisputed that the racial composition of cannery workers is predominantly nonwhite, and, therefore, those positions are primarily held by Filipinos and Alaska Natives. We know that this is because four of the canneries, Ekuk excluded, have a contract with Local 37 in Seattle to supply cannery workers, and we know further that Local 37 membership is predominantly Filipino. We also know that the Alaska Native cannery workers primarily come from sparsely populated areas immediately adjacent to four of the canneries.

Yet, the district court found that Filipinos constitute only about 1 percent of the population and labor force in the geographical region from which the canneries draw employees. Further, the district court found that Alaska Natives constitute only a small portion of the overall general population in the section of Alaska where canneries are located, which includes predominantly white city populations. From this comparison, it could easily be deduced that Alaska Natives and, more particularly, Filipinos are significantly over-represented in the cannery worker jobs.

On the other side of the coin, the district court found that the available general labor supply in the relevant geographic area was approximately 90 percent white. And, it is undisputed that the majority of at-issue jobs were held bywhites.

With this background in mind, it is obvious that the institutional factors involved tend to distort the racial

composition of the work force. Thus, when considering the skilled positions, statistics which merely highlight the segregation of whites and nonwhites between the at-issue and cannery worker jobs, without more, cannot serve to raise an inference that the segregation is attributable to intentional discrimination against any particular race. They can, as *Domingo* pointed out, serve to demonstrate the consequences of discriminatory practices which have already been independently established.

When jobs are not fungible, as in this case, statistics must reflect the qualifications of the applicant pool in order to be probative and credible on the discrimination issue. The fact that the qualifications themselves are subjective does not obviate this requirement as a matter of law. In this case, the district court found that the qualifications most needed for the skilled positions were skill and/or experience in performing the respective jobs. Certainly, there is a degree of subjectivity present when an employer chooses the applicant that he or she feels is best qualified. But it is not necessary that plaintiffs' statistics show that they were the best qualified. It is enough that they reflect the percentage of qualified nonwhites -- in this case, those with some skill and/or experience in the desired jobs and who were available to begin work in the preseason. Whether or not such statistics have sufficiently reflected the minimum qualifications actually imposed by the employer so as to raise an inference of intentional discrimination is then a question of fact left for the fact finder. For these reasons, we do not hesitate to find that the district court did not clearly err in assigning appellants' comparative statistics little probative value as to the skilled jobs.

The appellants further allege the district court erroneously held that the labor-market statistics offered by the defendant companies rebutted the appellants' *prima facie* case of intentional discrimination. The district court, however, did not so hold. It found defendants' labor-market statistics more probative than those of appellants because appellants' statistics had counted re-hires of employees during successive seasons and at successive canneries within the same season. Important considerations apart from the statistics played a determinative part in the court's conclusion that defendants had met their burden of production. As previously discussed, the court concluded from the evidence that all applicants were evaluated according to job-related criteria, albeit subjectively, and that oral inquiries and untimely applications served to eliminate hopeful employees, including some plaintiffs. Thus, appellants are incorrect in their basic assertion.

We further cannot find the district court clearly erroneous in its findings concerning job-related criteria. Appellants assert that the criteria were never imposed. The district court found otherwise. In so doing, the court took certain listed job qualifications verbatim from the defendants' pre-trial order. These lists, however, merely supported the court's conclusion that skill and/or experience were the general qualifications looked for in the hiring of employees for the specified jobs. After reviewing the record, we cannot conclude that the district court was clearly erroneous. *See Anderson v. Bessemer City,* 84 L. Ed. 2d at 527.

Appellants also urge reversal on the ground that the district court's findings failed to address the discrimi-

natory nature of separate hiring channels and word-of-mouth recruitment. We decline to do so. Findings of fact are adequate if they are explicit enough on the ultimate issues to give this court a clear understanding of the basis of the decision and to enable us to determine the grounds on which the trial court reached its decision. *Nicholson v. Board of Educ., Etc.*, 682 F.2d 858, 866 (9th Cir. 1982). *See also Barber v. United States,* 711 F.2d 128, 130-131 (9th Cir. 1983); *United States v. Alpine Land & Reservoir Co.,* 697 F.2d 851, 856 (9th Cir.) *cert. denied,* 104 S.Ct. 193 (1983); *De Medina v. Reinhardt,* 686 F.2d 997, 1011-1012 (D.C. Cir. 1982).

The ultimate fact, that there existed no pattern or practice of discrimination in hiring, promoting, paying and firing, is supported by the numerous subsidiary findings of the district court. Throughout the findings, the court discusses the manner in which the canneries hire and promote employees. Included are findings about the fact that cannery workers are hired routinely through Local 37, but that skilled positions are filled through individual screening. It would have been convenient had the district court labelled certain findings as addressing "separate hiring channels" and "word-of-mouth" recruitment. It is inconsequential in the end, however, because it is abundantly clear from the district court's opinion that these challenged practices were included in the ultimate finding. The court stated, "regardless of the manner in which a prospective employee came to the attention of the hiring personnel, the person was evaluated according to job related criteria." Thereafter, in concluding the case, the court encompassed all of the claims when it said "defendants did not discriminate in the hiring, firing, promoting, or paying . . ." The decision of the district court will not be

disturbed.

B. Housing

The vast majority of cannery employees live at the canneries during the season in bunkhouses provided by the companies. The appellants claimed that nonwhites, particularly Filipinos, were segregated from whites and placed in inferior bunkhouses because of racial discrimination. The district court found that appellants had established a *prima facie* case of intentional discrimination, but that the defendants' evidence proved nondiscriminatory motivations which the appellants had failed to prove pretextual. Specifically, the court found that the employees were housed by time of arrival and by crew.

The record contains ample evidence to affirm the district court's conclusion. While none of the cannery housing appears to have been luxurious, some bunkhouses were undoubtedly better than others. Testimony showed that workers who arrived at the canneries first, during the colder preseason period, were housed together in the best-insulated buildings. When the cannery workers eventually arrived, they were housed together in the remaining bunk-houses. This system enabled the companies to maintain only the amount of housing needed at any particular time. Furthermore, the workers were housed primarily by crew, thereby minimizing any inconvenience occasioned when different departments worked different shifts. While some mixing of crews did occur, the cannery workers were all housed together, regardless of

race.[4] Based on our review of the record, we do not find the district court clearly erroneous.

C. Messing

Cannery workers were also fed separately from the remainder of the work force. The appellants alleged that this was due to racial discrimination. The district court agreed that they had established a *prima facie* case of intentional discrimination, but that the defendants had met their burden of production and the appellants had not proved pretext. It is undisputed that the cannery worker mess halls served what is termed as a "traditional" oriental menu. The district court noted that the Local 37 contract provided for a separate culinary crew, and that Filipino and Asian persons dominated the membership in Local 37. Further, the court found that the quality and quantity of food served in the respective mess halls were the responsibility of the respective cooks, and that the older cannery workers preferred the traditional menu, to which the younger workers acceded. The court concluded that complaints about the food were attributable to personal taste, and that the segregated messing arrangement was attributable to the union and not the conduct of defendants. There is support in the record for these findings, and we cannot find them clearly erroneous.

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[4] The only exception to this appears to have been the few female cannery workers, who were housed apart from male cannery workers. White female cannery workers were housed with nonwhite female cannery workers, just as white and nonwhite male cannery workers were housed together.

III. Disparate Impact

From the beginning, appellants have insisted that their claims also be analyzed under the disparate impact model of Title VII. Impact analysis exemplifies the broad prophylactic purpose of Title VII, which is designed to achieve equality of employment opportunities by removing artificial barriers that act as "built-in head winds" against the progress of minority groups. *Connecticut v. Teal.* 457 U.S. 440, 447-448, 73 L. Ed. 2d 130, 137-138, 102 S.Ct. 2525 (1982); *Griggs v. Duke Power Co.,* 401 U.S. 424, 431-432, 28 L. Ed. 2d 158, 164-165, 91 S.Ct. 849 (1971). To make out a *prima facie* impact case, the plaintiff must show a facially neutral employment practice that has a "significantly discriminatory" impact upon a Title VII protected group. *Connecticut v. Teal,* 457 U.S. at 446, 73 L. Ed. 2d at 137. It is not necessary to prove discriminatory intent. *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 335 n. 15, 52 L.Ed.2d 396, 415 n. 15, 97 S.Ct. 1843 (1977); *Moore v. Hughes Helicopters.* Inc., 708 F.2d 475, 481 (9th Cir. 1983). The burden of proof then shifts to the defendant to establish that the practice has "a manifest relationship to the employment in question," *Griggs,* 401 U.S. at 432, 28 L.Ed.2d at 165, or is justified by a business necessity, *Moore,* 708 F.2d at 481. "The employer may also rebut the employee's *prima facie* case by showing the inaccuracy of the employee's statistics." *Id.* (citing *Contreras v. City of Los Angeles,* 656 F.2d 1267, 1273 (9th Cir. 1981), *cert. denied,* 455 U.S. 1021 (1982)). The plaintiff may still prevail by showing "that the employer was using the practice as a mere pretext for discrimination," *Connecticut v. Teal.* 457 U.S. at 447, 73 L.Ed.2d at 137, "or that the employer's purpose could be served by selection devices with less discriminatory

impact," *Moore*, 708 F.2d at 481 (citing *Dothard v. Rawlinson*, 433 U.S. 321, 329, 53 L.Ed.2d 786, 797, 97 S.Ct. 2720 (1977)).

The district court applied impact analysis to appellants' claims of nepotism,[5] but declined to do so for the balance of appellants' discriminatory hiring and promoting claims. The court noted a conflict in this circuit concerning whether impact analysis is proper in situations where employees are challenging the subjective nature of employment practices. Caught in the bind, the district court wisely chose to follow the precedent authority by refusing to use impact analysis across the board. Appellants challenge this legal decision, and we must attempt to resolve the problem *de novo*.

Griggs v. Duke Power, supra, was the first case to recognize that Title VII outlaws practices that are fair in form, but discriminatory in operation and impact. From this case grew the disparate impact model, challenging employment practices that are neutrally applied (thus making discriminatory intent difficult to prove), but that nevertheless operate to discriminate in effect. Examples of the type of objective, outwardly neutral employment practices clearly susceptible to impact scrutiny are pre-employment tests that adversely affect people of

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[5] The district court also used impact analysis to test an English language requirement and in an alternate holding in favor of defendants on the housing and messing claims. The language requirement finding is not challenged on this appeal, and for reasons discussed *infra* we will not review the court's impact discussion regarding housing and messing claims.

certain cultural backgrounds and pre-selection requirements such as height and weight restrictions. *See Griggs*, 401 U.S. 424, 28 L.Ed.2d 158, 91 S.Ct. 849 (1971); *Dothard*, 433 U.S. 321, 53 L.Ed.2d 786, 97 S.Ct. 2720 (1977).

By and large, however, appellants have not challenged a specific facially neutral practice. Rather, appellants have mounted a broad-scale attack against the gamut of defendants' subjective employment practices. We have firmly stated that subjective practices are particularly susceptible to discriminatory abuse and should be closely scrutinized. *Kimbrough*, slip op. at 9. At the same time, it is certain that subjective practices and decisions are not illegal *per se*. *Id.*; *Heagney v. University of Washington*, 642 F.2d 1157, 1163 (9th Cir. 1981).

The gray area of conflicting opinion is whether the close scrutiny of these practices can or should take the form of a disparate impact analysis.

In *Heagney*, upon which the district court relied, the plaintiff challenged the University's power to classify certain jobs as "exempt" from state personnel laws, which, in turn, gave the school more discretion in setting salaries. We held that the crux of the complaint was an objection to the lack of well-defined criteria, which could not be equated with practices such as personnel tests or minimum physical requirements. Thus, impact analysis was inappropriate. 642 F.2d at 1163. *O'Brien v. Sky Chefs. Inc.*, 670 F.2d 864 (9th Cir. 1982), followed on the heels of *Heagney*, and once again held that the lack of welldefined criteria must be challenged under disparate treatment.

The conflict in this circuit arose with the decision in *Wang v. Hoffman*, 694 F.2d 1146 (9th Cir. 1982), which challenged the manner in which the Army Corps of Engineers hired and promoted employees. Without cite to *Heagney* or *O'Brien*, our court applied impact analysis to the plaintiff's claim that the subjective selection process used by the Corps provided inadequate guidelines and could be manipulated in order to eliminate certain candidates. Although a language skills requirement -- traditionally subject to impact analysis because it is objective and facially neutral -- appeared central to the court's concerns, the discussion reflects a deeper worry that the language requirement was added intentionally to disadvantage the plaintiff. 694 F.2d at 1149. Unfortunately, this speaks to intent, which is irrelevant in impact cases. Nevertheless, *Wang* seems to support the appellants' arguments at bar. *See also, Peters v. Lieuallen*, 746 F.2d 1390 (9th Cir. 1984).

In subsequent cases we have recognized the conflict between *Heagney* and *Wang*, and expressed opinion without resolving the question. *See Moore*, 708 F.2d 475 (9th Cir. 1983) (although unnecessary to decision, disparate treatment focus better suited to analysis of subjective decision making). *Domingo*, 727 F.2d 1429 (9th Cir. 1984) (disparate treatment more appropriate approach because defendant's practices were not facially neutral); *Spaulding* 740 F.2d 686 (9th Cir. 1984) (holding impact analysis only applicable to specific, facially neutral policies, rather than a full-scale challenge to an employer's practices, of which lack of well-defined criteria is not facially neutral).

We choose to follow the *Heagney* line of authority

because we believe it to be the correct view.[6] Without question, employment discrimination is an evil which continues to plague our society and must be battled. Title VII was designed for that purpose, to make race (or sex, etc.) an irrelevant factor in hiring decisions. It must be remembered, however, that the disparate impact model was not explicitly provided for in the statute, but rather was first enunciated in *Griggs* as a mode of implementing the broad purposes of Title VII. While it has been argued that subsequent congressional actions have served to implicitly ratify the creation of disparate impact,[7] it is no less clear that Congress was concerned about mandating color-blindness with as little intrusion into the free market system as possible. Courts have noted that it was deemed essential that employers remain free to set employment qualifications as they honestly saw fit, so long as those qualifications were not based on race, color, religion, sex, or national origin. *See Griggs*, 401 U.S. at 436, 28 L.Ed.2d at 167; *Contreras*, 656 F.2d at 1277-78.

Presumably, therefore, the disparate impact model was created to challenge those specific, facially-neutral practices that result in a discriminatory impact and that by

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[6] Moreover, we agree with the district court. Principled institutional decision-making requires that we adhere to *Heagney*, the first in line. We believe the other panels acted improperly in ignoring *Heagnes*. It is the law of this circuit by which we are bound until overruled by appropriate en banc proceedings.

[7] *See* Helfand & Pemberton, *The Continuing Vitality of Title VII Disparate Impact Analysis*, 36 Mercer 939, 944-954 (1985).

their nature make intentional discrimination difficult or impossible to prove. Were the facial-neutrality threshold to disappear or be ignored, the distinction between disparate impact and disparate treatment would diminish and intent would become a largely discarded element. Rather than being an irrelevant factor as envisioned, race (or sex, etc.) could then become an overriding factor in employment decisions. Employers with work forces disproportionate to the minority representation in the labor force could then face the choice of either hiring by quota or defending their selection procedures against Title VII attack. We do not find such a result has been mandated by Congress or through Supreme Court interpretation of Title VII. Therefore, practices and policies such as a lack of well-defined criteria, subjective decision making, hiring from different sources or channels, word-of-mouth recruitment, and segregated housing and messing, which are not facially neutral, lend themselves far better to scrutiny for intentional discrimination. Consequently, we hold that disparate impact analysis was correctly withheld by the district court when considering these claims.[8]

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[8] In addition to the conflict within this court, the circuit courts of appeals are split on the applicability of disparate impact analysis to subjective employee selection practices. Those which have applied impact analysis are the Fifth, Sixth, Tenth, Eleventh and D.C. Circuits. *See Rowe v. General Motors Corp.*, 347 F.2d 348 (5th Cir. 1972); *Rowe v. Cleveland Pneumatic Co., Numerical Control, Inc.*, 690 F.2d 88 (6th Cir. 1982); *Lasso v. Woodmen of World Life Ins. Co.*, Inc., 741 F.2d 1241 (10th Cir. 1984); *Williams v. Colorado Springs School Dist.*, 641 F.2d 835 (10th Cir. 1981); *Griffin v. Carlin*, 755 F.2d 1516 (11th Cir. 1985); *Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984). Those

Appellants' nepotism allegations, which we have previously held proper for impact analysis, *Bonilla v. Oakland Scavenoer Co.*, 697 F.2d 1297 (9th Cir. 1982), *cert. denied*, 104 S.Ct. 3533 (1984), were properly so considered by the district court. As previously discussed, the court found that no pattern or practice of nepotism existed because there was no preference for relatives. We do not hold those findings to be clearly erroneous. In addition, we find appellants' remaining allegations of error, concerning re-hire preferences and termination of Alaska natives, to be without merit.

Accordingly, for the reasons set out in this opinion, the district court is

AFFIRMED.

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circuits which have said they will only apply impact analysis to specified objective employee selection practices include the Fourth, Fifth, Eighth, and Tenth Circuits. *See EEOC v. Federal Reserve Bank*, 698 F.2d 633 (4th Cir. 1983); *Pope v. City of Hickory*, 679 F.2d 20 (4th Cir. 1984); *Vuyanich v. Republic Nat'l Bank*, 723 F.2d 1195 (5th Cir. 1984); *Carroll v. Sears, Roebuck & Co.*, 708 F.2d 183 (5th Cir. 1983); *Carpenter v. Stephen F. Austin State Univ.*, 706 F.2d 183 (5th Cir. 1982); *Talley v. United States Postal Service*, 720 F.2d 505 (8th Cir. 1983); *Harris v. Ford Motor Co.*, 651 F.2d 609 (8th Cir. 1981); *Mortensen v. Callaway*, 672 F.2d 822 (10th Cir. 1982).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK ATONIO, EUGENE BACLIG, RANDY DEL FIERRO, CLARKE KIDO, LESTER KURAMOTO, ALAN LEW, CURTIS LEW ROBERT MORRIS, JOAQUIN ARRUIZA, BARBARA VIERNES, as administratrix of the estate of Gene Allen Viernes, and all others similarly situated,	)	NOS. 81-3181 D.C. No. 74-145-M
Plaintiffs-Appellants,	)	MEMORANDUM
v.	)	
WARDS COVE PACKING COMPANY, INC., CASTLE COOK, INC., and COLUMBIA WARDS FISHERIES,	)	
Defendants-Appellees.	)	

Argued and submitted -- January 7, 1982
Decided -- March 31, 1982

Appeal from the United States District Court for the
Western District of Washington
Walter T. McGovern, District Judge,
Presiding

Before: ANDERSON and ALARCON, Circuit Judges, and Hon. Walter E. Craig, Senior United States District Judge for the District of Arizona, sitting by designation.

I.

Frank Atonio, et al., [Appellants/Plaintiffs] appeal from the judgment of the district court, dismissing their Title VII action for lack of jurisdiction.

Appellants contend that: (1) the appellee, Wards Cove Packing Co., Inc. [Wards] was adequately identified in Appellants' initial Equal Employment Opportunity Commission [EEOC] charge; (2) the Appellants' subsequent amendment of the EEOC charges cured any "naming defects"; (3) the amendments were timely because they related back to the date that the original EEOC charges were filed; (4) the amendments were timely because there were continuing acts of discrimination by Wards; (5) the district court should have allowed Appellants to assert the EEOC Commissioner's charges against Appellees; (6) the district court should have allowed Appellants to amend their complaint to include additional charges of discrimination against Appellees.

We reverse the district court's judgment of dismissal as to Appellee Wards. The initial EEOC charges placed Wards on actual notice that employment discrimination

charges were being instituted against them.

II.

Wards independently operates two canneries in Alaska, one is Wards Cove and the other is Red Salmon. Columbia is a joint venture comprised of two partners, Wards and Castle and Cooke, Inc. Appellees Wards and Columbia have the same address and share the same offices. A.W. Brindle, president of Wards also serves as a manager of the Columbia joint venture and other Brindle family members manage various Wards and Columbia canneries. In addition, both companies share the same legal staff. Thus, Wards and Columbia have a common home base, a common ownership, a common management and a common legal department. Two appellants incorrectly named "Columbia Wards Packing Co." as the defendant in their original EEOC charges; this was a misnomer that could have referred to either Wards or Columbia. The other Appellants named Columbia as the defendant in their original EEOC charges. Wards contends that because the EEOC charges did not correctly designate them as Appellants' employer that they were not on actual notice that EEOC charges had been filed against them.

Clearly, Wards had actual and constructive notice. Appellants contend that in the body of the EEOC charges they identified Wards Cove as the cannery at which they worked. Appellees do not refute this but counter Appellants' allegation with the fact that the correct employer Wards was not named in the charge. Wards Cove was operated by Wards and the EEOC charges were mailed to Wards' office. A.W. Brindle, the president of

Wards and a manager of Columbia, during deposition testimony conceded "that as soon as he saw (on the EEOC charge) that an individual worked at the Wards Cove facility that he immediately knew who their proper employer was." Moreover, Mr. Brindle was personally acquainted with some of the Appellants named in the charges and thus could have easily determined the name of the correct employer.

III.

The court initially dismissed Appellants' Title VII claims for lack of jurisdiction because Wards was not the respondent named in the original EEOC charge, as required by 42 U.S.C. § 2000e-5(f)(1) (enforcement provisions).[9] The EEOC regulations, that interpret 2000e-5(f)(1), use a more flexible approach in determining whether a party has been sufficiently designated in an EEOC charge. These regulations state that "a charge is deemed filed when the Commission receives from the person making a charge a written statement sufficiently precise to identify the parties and to describe generally the action or practices complained of." 29 C.F.R. § 1601.11.

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[9] U.S.C. § 2000e-5(f)(1) states as follows: If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) of (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge . .

The court, in determining the adequacy of the EEOC charges should have applied this EEOC regulation. Congress delegated authority to the EEOC to issue procedural regulations to implement the provisions of Title VII. 42 U.S.C. § 2000e-12(a). *Lynn v. Western Gillette, Inc.*, 564 F.2d 1282, 1286 (9th Cir. 1977). In the instant case, whether we apply 42 U.S.C. § 2000e-5(f)(1) or 29 C.F.R. §1601.11, Appellants have adequately defined Wards as the defendant in their original EEOC charge.

This court, in *Gibson v. Local 40*, 543 F.2d 1259, 1263 n.1 (9th Cir. 1976), held that the purpose of 42 U.S.C. § 2000e-5(f)(1) was satisfied when "[a] copy of the charge was mailed to ILWU [the union]. Everyone treated ILWU as a fully participating party [to the litigation]. ILWU did not raise the issue of whether it was named in the charge until the first day of the second trial." In the present case, looking at the totality of the circumstances -- the fact that a copy of the charges were mailed to Wards' business address and the commonality of Wards' and Columbia's management, ownership, legal department and offices -- it cannot be said that "EEOC and the parties were [not] apprised of both the acts alleged to be discriminatory and the parties allegedly responsible for them." *Id.; See Kaplan v. International Alliance of Theatrical and Stage Employees*, 525 F.2d 1354, 1358-59 (9th Cir. 1975); note, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1203-04 (1971).

In *Kaplan*, we held that, "[t]he administrative charge [EEOC charge] required by Title VII does not demand procedural exactness. It is sufficient that the EEOC be apprised, in general terms, of the alleged

discriminating parties and the alleged discriminatory acts." 525 F.2d at 1359. The Appellants have met these requirements for the reasons heretofore discussed. We reject appellees' attempt to restrict *Kaplan* to EEOC plaintiffs who filed their charges without the assistance of counsel. On a similar set of facts, in *Heiniger v. City of Phoenix*, 625 F.2d 842, 844 (9th Cir. 1980), appellees alleged that because the appellants had received legal assistance before the filing of EEOC charges, strict compliance with all technical requirements would be mandated. We disagreed and held that, "the availability of counsel does not foreclose appellants from reasonable reliance on EEOC-established procedures designed to insure compliance with Title VII's exhaustion requirements . . ." *Id.* at 845. In *Heiniger,* we cited with approval the observations of the Court of Appeals for the Fifth Circuit, regarding the educational level of the EEOC plaintiff. "The point is that *some* charging parties are uneducated and inarticulate, and the procedural rules we develop in this case and in others must be sufficiently liberal to protect their rights. . . In the context of Title VII, no one -- not even the unschooled -- should be boxed out." *Id.* at 845 (citing *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 463 (5th Cir. 1970)). Thus, the level of sophistication of the plaintiff or the fact that they have sought legal counsel does not diminish their right to the protections of Title VII.

We noted in *Ramirez v. National Distillers & Chemical Corp.*, 586 F.2d 1315, 1320-21 (9th Cir. 1978), that procedural technicalities should not be used to deny a Title VII claimant the right to a judicial hearing on the merits. "In keeping with the remedial goals of the statute, we have repeatedly held that the statute itself, the proce-

dural framework, and the pleadings must be liberally construed in favor of those who are alleged victims of discrimination." *Id.* at 1321.

In sum, Appellants sufficiently identified Wards in their original EEOC charges and the court should have allowed amendments to these charges.

The only Appellant employed by Columbia during the relevant time period was Randy del Fierro. Appellant's employment by Columbia was in 1971. Appellant del Fierro did not file his EEOC charge until November 1973. Thus, his charge is time barred, because it was not filed with the EEOC within 180 days after "the alleged unlawful employment practices" occurred, as required by 42 U.S.C. §2000e-5(e).

REVERSED in part **AFFIRMED** in part and **REMANDED** for proceedings consistent with this memorandum.

The petition for rehearing is denied.

FILED
November 4, 1983

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

FRANK ATONIO, et al.,	)	
	)	
Plaintiffs	)	NO. C-74-145-JLQ
	)	
vs.	)	
	)	OPINION FOLLOWING
WARDS COVE PACKING COMPANY, INC. et al.,	)	NONJURY TRIAL
	)	
	)	
	)	
Defendants	)	
	)	

This class action challenges various employment practices of three Alaska salmon canning companies under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.* (1970 ed. and Supp. V), and the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1970 ed.). Early during the pendency of this lengthy action, the Title VII claims against two of the defendant companies, Ward Cove Packing Company and Columbia Wards Fisheries were dismissed. Since then, the Ninth Circuit, in an amended decision, reinstated the Title VII claims against Ward Cove Packing Company. *Atonio, et al. v. Ward Cove Packing Co., et al.*, Slip Op. No. 81-3181 (Oct. 21, 1982) (unpublished Order Amending *Atonio, et al. v. Ward Cove Packing Co, et al*, 703 F.2d 329 (9th Cir.

1982)). Plaintiffs are present and former employees alleging defendants discriminate on the basis of race in hiring, firing, paying, promoting, housing and messing at the canneries.

The class certified is all nonwhites who are, will be, or have been since March 20, 1974, employed by defendants Ward Cove Packing Company (WCP), Bumble Bee Seafoods division of Castle & Cooke, Inc. (BBS), or by Columbia Wards Fisheries (CWF) at its Alitak or Ekuk cannery facilities. See Amended Certification Order of Chief Judge Walter T. McGovern at Ct. Rec. 138.

After a lengthy nonjury trial this court makes these

FINDINGS OF FACT

1. Plaintiff Frank Atonio is of Samoan descent. Plaintiffs Alan Lew and Curtis Lew are of Chinese descent. Plaintiffs Eugene Baclig, Joaquin Arruiza and Randy del Fierro are of Filipino descent. Plaintiff Gene Allen Viernes was of Filipino descent. He died on June 1, 1981. Barbara Viernes, his personal representative, was substituted as a plaintiff for him. Plaintiffs Clarke Kido and Lester Kuramoto are of Japanese descent. Robert Morris is of Japanese and Native American descent. All plaintiffs except Frank Atonio are United States citizens.

2. Defendant WCP is an Alaska corporation. It has had over twenty-five (25) employees for each working day in at least twenty (20) weeks of each year from 1970 onward. It has been engaged in an industry affecting commerce at least since 1970.

3. Defendant Castle & Cooke, Inc. (BBS) is a Hawaii corporation, of which Bumble Bee Seafoods is a division. It has had over twenty-five (25) employees for each working day in at least twenty (20) weeks of each year from 1970 onward. It has been engaged in an industry affecting commerce at least since 1970.

4. Defendant CWF is a joint venture. It has had over twenty-five (25) employees for each working day in at least twenty (20) weeks of each year from 1970 onward. It has been engaged in an industry affecting commerce at least since 1970.

5. The joint venturers or operators of defendant CWF are defendants WCP and BBS. At least since 1970, WCP and BBS have operated the venture jointly and equally.

6. In operating the CWF joint venture, WCP and BBS have each acted as the agent of CWF.

7. At least since 1970, WCP has owned and operated two (2) Alaska salmon canneries: Red Salmon Cannery and Wards Cove Cannery.

8. At least since 1970, BBS has owned and operated one Alaska Salmon Cannery: Bumble Bee Cannery.

9. At least since 1970, WCP and BBS have operated five (5) Alaska salmon canneries as part of the CWF joint venture: Alitak cannery and Ekuk cannery; Kenai cannery; Port Baily cannery; and Icy Cape cannery. They have also jointly and equally operated four (4) Alaska fish camps as part of the venture: Egegik, Craig, Chignik

Lagoon and Moser Bay, Alaska. The canneries having practices at issue in this case are Bumble Bee (at South Nahnek on Bristol Bay), Red Salmon (at Nahnek on Bristol Bay), Wards Cove (at Ketchikan in southeast Alaksa), Ekuk (on the Nashugak River in Bristol Bay), and Alitak (on Kodiak Island).

10. The CWF facilities are owned by CWC Fisheries, Inc. It is a dormant corporation. Its only function is ownership of those facilities. Defendants WCP and BBS each own 50% of CWC Fisheries, Inc. The managers of CWF are the president and vice president of CWC Fisheries, Inc. The remaining officers and the directors of CWC Fisheries, Inc., are officers of WCP and BBS.

11. At least since 1970, WCP and BBS have each owned 50% of Lake Union Terminals, Inc. Lake Union Terminals, Inc., owns a boat yard in Seattle, Washington which is known as LUT Yard. LUT Yard is a division of defendant CWF, which services assets such as tenders and fishing boats owned by CWC Fisheries, Inc., and WCP. CWC Fisheries, Inc., owns the defendant CWF tenders.

12. Plaintiff Arruiza was employed by defendant BBS during the 1971-73 salmon canning seasons.

13. Plaintiffs Kido and Karamoto were employed by defendant BBS during the 1971 salmon canning season. They were also employed by defendant WCP during the 1970 and 1972-73 salmon canning seasons.

14. Plaintiff Viernes was employed by WCP during the 1969-73 salmon canning seasons.

15. Plaintiffs Alan Lew and Curtis Lew were employed by WCP during the 1972-73 salmon canning seasons.

16. Plaintiff Frank Atonio was employed by WCP during the 1972-75 salmon canning seasons. He was also employed by defendant CWF during the 1980 season.

17. Plaintiff Randy del Fierro was employed by WCP during the 1970 and 1972-73 salmon canning seasons. He was also employed by defendant CWF during the 1971 season.

18. Plaintiff Robert Morris was employed by WCP during the 1973 season.

19. Plaintiff Eugene Baclig was employed by WCP during the 1969-73 seasons.

20. No representative plaintiff has worked at the CWF cannery at Ekuk.

21. On October 31, 1973 plaintiffs Frank Atonio, Lester Kuramoto, Clarke Kido and Eugene Baclig filed with the Equal Employment Opportunity Commission ("EEOC") the charges marked Exhibits 1-4. On November 16, 1973 plaintiffs Randy del Fierro and Joaquin Arruiza filed with the EEOC the charges marked Exhibits 5-6. On January 2, 1974, plaintiffs Alan Lew and Curtis Lew filed with the EEOC the charges marked Exhibits 7-8. On January 31, 1974 Robert Morris filed with the EEOC the charge marked Exhibit 9. On February 14, 1974 plaintiff Gene Allen Viernes filed with the EEOC the charge marked Exhibit 10.

22. On November 13, 1973 the EEOC deferred the Atonio, Kuramoto, Kido, Arruiza and del Fierro charges to the Washington State Human Rights Commission. On January 23, 1974 the EEOC assumed jurisdiction over these charges. The EEOC served the statutory notices of the charges.

23. On January 9, 1974 the EEOC deferred the Lew charges to the Washington State Human Rights Commission. On January 18, 1974 the EEOC assumed jurisdiction over these charges. The EEOC served the statutory notice of the charges.

24. On February 1, 1974, the EEOC deferred the Morris charge to the Washington State Human Rights Commission. On March 7, 1974 the EEOC assumed jurisdiction over the charge. The EEOC served the statutory notice of the charge.

25. On March 4, 1974 the EEOC deferred the Viernes charge to the Washington State Human Rights Commission. On May 6, 1974 the EEOC assumed jurisdiction over the charge. The EEOC served the statutory notice of the charge.

26. On March 13, 1974 the EEOC deferred the Viernes charge to the Washington State Human Rights Commission. On May 13, 1975 the EEOC assumed jurisdiction over the charge. The EEOC served the statutory notice of the charge.

27. On March 11-12, 1974, the EEOC mailed plaintiffs Clarke Kido, Lester Kuramoto, Alan Lew, Curtis Lew, Frank Atonio, Joaquin Arruiza and Randy del Fierro

-- as well as Robert Morris -- the letter and right-to-sue notices marked Exhibits 11-18, 20-27. This action was filed within 90 days of receipt of those notices.

28. On May 24, 1974 the EEOC mailed plaintiff Baclig the letter and right-to-sue notice marked Exhibits 19 and 28.

29. On July 18, 1974 the EEOC mailed plaintiffs Alan Lew and Lester Kuramoto filed with the EEOC the originals of Exhibits 29-30. On August 5, 1974 plaintiff Eugene Baclig filed with the EEOC the original of Exhibit 31. On August 5, 1974 plaintiff Curtis Lew and Robert Morris filed with the EEOC the originals of Exhibits 32-33. On August 21, 1974 plaintiff Clarke Kido filed with the EEOC the original of Exhibit 34. On September 24, 1974 Plaintiffs Frank Atonio and Gene Allen Viernes filed with the EEOC the originals of Exhibits 35 and 37. In mid-October, 1974 Plaintiff Randy del Fierro filed with the EEOC the original of Exhibit 527.

30. On November 13, 1974, the EEOC mailed plaintiffs Alan Lew, Curtis Lew, Eugene Baclig, Clarke Kido, Gene Allen Viernes, Frank Atonio and Lester Kuramoto -- as well as Gene Allen Viernes and Robert Morris -- the originals of Exhibits 38-53.

31. On June 27, 1972, Commissioner's charges were filed with the EEOC against WCP. They are marked Exhibits 54-55.

32. In February 1974 the EEOC entered into a conciliation agreement with defendants WCP and CWF based on the Commissioner's charge.

33. No plaintiff or member of the aggrieved classes described in the Commissioner's charges marked Exhibits 54-55 was a party to the conciliation agreement settling those charges.

34. The EEOC has not filed a civil action against either defendant WCP or defendant CWF on the basis of the Commissioner's charges.

35. On March 27, 1975 plaintiffs requested that the EEOC issue right-to-sue letters based on the Commissioner's charge against defendant Wards Cove Packing Company, Inc.

36. On April 15, 1975 the EEOC's Seattle District Office wrote plaintiffs' attorneys, declining to issue these right-to-sue letters.

37. On March 1, 1976 the EEOC's General Counsel overruled the Seattle District Office's decision not to issue right-to-sue letters based on a Commissioner's charge.

38. On March 19, 1976 the EEOC issued Frank Atonio, Eugene Baclig, Randy del Fierro, Clarke Kido, Lester Kuramoto, Alan Lew, Curtis Lew, Robert Morris and Gene Allen Viernes a letter and right-to-sue notices based on the Commissioner's charges against Wards Cove Packing Company and Columbia Wards Fisheries. They are marked Exhibits 56-57.

39. On April 22, 1976 plaintiffs moved for an Order indicating that the court would permit them to amend their complaint so as to allege receipt of the right-to-sue notices.

40. On July 21, 1975 plaintiff Clarke Kido filed the EEOC charge marked Exhibit 58.

41. On July 25, 1975 the EEOC deferred the charge to the Washington State Human Rights Commission. On August 7, 1975 the EEOC assumed jurisdiction over the charge. The EEOC served the statutory notice of the charge.

42. On March 11, 1980 the EEOC mailed plaintiff Clarke Kido the right-to-sue notice marked Exhibit 428.

43. On May 1, 1980 plaintiffs moved to amend their complaint so as to allege receipt of the letter and right-to-sue notice.

44. On June 20, 1977 plaintiff Gene Allen Viernes filed with the EEOC the charge marked Exhibit 528, and filed with the Washington State Human Rights Commission the charge marked Exhibit 429.

45. On or prior to September 1, 1977 the EEOC assumed jurisdiction over the charge filed with it. The EEOC served the statutory notice of the charge.

46. On August 3, 1977 plaintiff Gene Allen Viernes filed with the EEOC the charged marked Exhibit 430.

47. On August 5, 1977 the EEOC deferred the charge to the Washington State Human Rights Commission. On August 26, 1977 the EEOC assumed jurisdiction over the charge. The EEOC served statutory notice of the charge.

48. On May 31, 1978 the EEOC mailed plaintiff Viernes the right-to-sue notices marked Exhibits 431-32.

49. The defendants are engaged in the salmon processing business in various Alaska locations. Most of the processing has been done by canning although in recent years some has also been done by freezing.

50. Defendants' facilities are generally located in remote, widely separated areas of Alaska. Thus, the canneries and fish camps are self-supporting installations where the crews are housed and fed by the company.

51. Since summer salmon runs are very short, it is essential that the canneries operate at peak production as much of the time as possible.

52. Most of the jobs at the canneries are seasonal and of short duration. Only the cannery superintendent, the assistant cannery superintendent, and certain office personnel are employed by the company on a permanent year-around basis with the exception of Ward Cove's small winter maintenance crew and certain machinists, carpenters, beachmen and tendermen who may be employed in the shipyard in the offseason. Each facility also has a winter watchman.

53. In some years, a cannery may not operate at all. Some facilities are abandoned canneries which operate as fish camps. A fish camp is a support facility for fishermen which does not process salmon by canning or freezing.

54. Wards Cove cannery canned salmon in 1970 and 1972-80, and operated as a fish camp in 1971. Red

Salmon Cannery canned salmon in 1970-72 and 1977-80, and operated as a fish camp in 1973-76. Bumble Bee cannery canned salmon in 1970-73 and 1975-80, and operated as a fish camp in 1974. Ekuk cannery canned salmon in 1970-80. Alitak canned salmon in 1970-80.

55. Readying the canneries and fish camps for operations is done during May or June of each year.

56. Pre-season work is intense, involving extensive overtime, and must be done in a short period of time.

57. The intense period of pre-season work allows no time for training unskilled workers for skilled jobs.

58. When the cannery is open and running, the cannery workers arrive just before the start of fishing operations. If they are idle prior to canning, they are often given unskilled work as called for by their contract, such as grass cutting and cannery cleanup. The grass is cut by knives and hand sickles. Use of lawn mowers is impractical due to the length of the grass and steep hilliness of much of the terrain.

59. In addition to estimates made by the Alaksa Department of Fish and Game and the Fisheries Research Institute at the University of Washington, management makes its own estimate for each run at each facility. Accordingly, the decision is made as to how many canning lines to operate and the number of employees to be hired.

60. Frequently, the predicted run varies considerably from the actual run, and during the season the actual catch may vary tremendously on a daily basis. Also, the

Alaska Department of Fish and Game will open or close fishing by emergency order depending upon the amount of escapement.

61. All fishermen are now "independent", on their own boats and are not employees. They are paid by the pound for fish and each crew divides the profit on a share basis. Prior to 1974, "company" fishermen were paid by the fish or on a piecework basis.

62. Bristol Bay gillnet fishing boats and some seine boats on Kodiak Island are stored in the offseason in the cannery. Due to the remoteness of those locations, repairs to those fleets are performed by such cannery employees as the caulkers, shipwrights, carpenters, and port engineers.

63. Salmon are extremely perishable and must be processed within 48 hours of capture. Most salmon is transferred from the fishing grounds to the canneries aboard "dry" or unrefrigerated tenders; refrigerated or "brine" tenders can hold fish for several days and can transfer them to other areas for processing.

64. Tenders carry equipment and supplies to the cannery location in time for use and storage well in advance of operations. During the season, the tenders will also count fish by species. In Bristol Bay, fishermen were often fed on the tenders during unloading until 1981.

65. After arrival at the cannery, the fish are conveyed to a "fish house" where the salmon are eviscerated, the eggs pulled, and they are cleaned. In the fish house is located the salmon butchering machine. This eviscerat-

ing machine is patented under the name of "Iron Chink" machine.

66. Salmon eggs are processed under the supervision of Japanese nationals who are not employees of the defendants. The processed eggs are marketed in Japan as a specialty product known as "suyiko".

67. The canning is done under regulation of the Food and Drug Administration. The major cleanup, which is performed every 24 hours and which lasts approximately 3-1/2 to 4 hours, is mandatory. The canning lines run at a rate of 235-260 cans per minute or four cans per second.

68. After filling, the canned salmon are cooked in steam pressure retorts. The precise time/temperature requirements are established by the FDA. Failure to keep accurate records can result in FDA seizure and impoundment of all lots for which there are no records verifying that a "proper cook" was made. The cannery could be forced to recan and recook all "suspect" lots, an expensive procedure.

69. It is important that the machinists ensure that proper seals on can bottom (can shop machinist) and top (seamer machinist) are made, the side seams are secure, and that the salmon are properly cooked (salmon cook) to avoid botulism and to provide a wholesome, quality product for sale.

70. During the canning operations various machinists are engaged in ensuring the continued smooth operation of the equipment. There are several who specialize in certain equipment; that is, the "filler man", "seamer man",

"salmon cook", and "can shop" are typical of these specialties. In case of a breakdown of the machine, an entire line will be out of production until repair is effected.

71. CWF also maintains and operates a shipyard in Seattle, Washington, under the name "Lake Union's Terminals". BBS also has a resident vice president with a small support staff at 88 East Hamlin in Seattle. The home office of its Bumble Bee Seafoods division is Astoria, Oregon where the Bumble Bee cannery superintendent and his staff is located.

72. At least since 1970 John R. Gilbert has been defendant BBS's vice president in charge of Alaska operations and one of two managers of the CWF's joint venture.

73. From at least 1970 through 1977, A.W. Brindle was president of defendant WCP and a manager of the defendant CWF joint venture. After his death in 1977, A.W. Brindle was succeeded in these roles by Alec W. Brindle.

74. The overall management of CWF is vested in Alec W. Brindle and John R. Gilbert. They communicate directly with each operations' superintendent.

75. Exhibit 60 is the only document generally governing the terms of the defndant CWF joint venture. It was executed by defendant WCP and the predecessor of defendant BBS in the venture.

76. Employees at 88 East Hamlin, Seattle, Washington perform duties for both defendants WCP and

defendant CWF regardless of which defendant's payroll they are on.

77. At least since 1970 defendant CWF has not had an independent representative at collective bargaining negotiations. Instead, it has relied on the representative of defendants WCP and BBS.

78. At least since 1970 the president of defendant WCP has been primarily responsible for setting its hiring policies, firing policies, promotion policies and employee regulations. He has also been responsible for hiring its cannery superintendents and office managers. The vice president in charge of Alaska operations for defendant Castle & Cooke, Inc., has had similar responsibilities for that defendant's cannery. These two individuals have jointly and equally had the same responsibilities for the defendant Columbia Wards Fisheries' facilities.

79. Decisions on whether a plant will operate, the size of its crew, salaries of its non-union personnel, the basic amounts of its supplies, the equipment it will have, whether a capital expenditure should be made and other major decisions are made jointly for CWF by the venture's managers. Such decisions are made for defendant WCP's facilities by its president. Those decisions are made for the BBS facility by its vice president in charge of Alaska operations.

80. Except as described elsewhere, the superintendent of each facility is ultimately responsible for recruiting, screening, hiring, promoting and terminating employees for that facility. He is also ultimately responsible for assigning employees to bunkhouses, assigning crews to

dining areas and making improvements which do not require capital expenditures.

81. At least since 1970 the superintendent of defendant BBS's facility has reported directly to that defendant's vice president in charge of Alaska operations. During 1970-77 the president of WCP was also superintendent of Red Salmon Cannery. The superintendent of Wards Cove Cannery reported directly to him. Since 1977 superintendents of both canneries have reported directly to Alec W. Brindle, who is the current president of defendant WCP.

HIRING POLICIES AND PRACTICES

82. Preliminarily, it must be noted there are two (2) general categories of cannery jobs. The first category includes the "cannery" workers and "laborer" jobs. The second category includes all other departments and are designated "noncannery".

83. None of the five class canneries has advertised for jobs at least since 1970, although the Alaska State Employment Service has been called. Generally, vacancy notices have not been posted at the Bumble Bee, Red Salmon, Ward Cove or Ekuk canneries since 1970 and at least from 1970 through 1975 midseason vacancies have not been posted at Alitak except for two positions for cook and one for "laundress-bedmaker."

84. Many of the jobs at defendants' facilities are covered by union contracts which have rehire preference clauses.

85. Defendants' policy and practice is to adhere to the union rehire preference clauses and to offer employment in the same jobs to past satisfactory employees for the new season. Employees, including nonresident cannery workers, take advantage of these clauses to secure employment. Nonresident cannery workers are those whose off-season residence is the Lower 48. Resident cannery workers are those whose off-season residence is Alaska.

86. Hiring for all jobs except resident cannery workers and spring and fall laborers takes palce at defendants' home offices in Seattle and Astoria during the first three months of the year. Most employees, particularly in the skilled jobs, are hired before April 1 each year for the upcoming season. Most noncannery jobs also require availability by the end of April for that year.

87. The rehire preference rights of past employees are respected in determining the number of vacancies to be filled for the new season. The remaining vacancies are filled from among those who seek employment with defendants during the fall and winter preceding the upcoming season. Defendants do not generally look to applications for the preceding season in filling openings for the upcoming season.

88. Defendants generally do not treat general oral inquiries about jobs made during the preceding season as an application for a position in the upcoming season a year away. This is particularly true when the employee fails to follow up the inquiry with an application. Defendants do not treat white or non-white persons differently in this respect.

89. Defendants receive far more applications than there are vacancies for the upcoming season. The majority of the applications for non-cannery worker positions are by whites or by persons who are not identifiable as racial minorities. Defendants have received relativey few applications from nonwhite employees for noncannery worker positions.

90. Resident cannery workers and spring and fall laborers are usually hired from the general labor force in the areas closest to each cannery. Except for Wards Cove, this labor force is small. The 1970 Census for the City of South Naknek, Exhibit A-35, illustrates this. The entire population of Bristol Bay Census Division, which covers thousands of square miles, was only 3,500 people in 1970. It is not a reasonable business practice to scour such sparsely populated, remote regions for skilled and experienced workers.

91. Except at Ekuk, non-resident cannery worker jobs which are not filled by employees with rehire preferences are filled through the dispatch procedure of Local 37.

92. Local 37 male members have refused to work in the egg department without overtime and by special agreement with the union workers outside the Local 37 source are hired although they must join the union.

93. Management does not direct any of its cannery worker foremen to hire or line up members of any particular race for his crew.

94. Employees and non-employees are free to apply

for any job for which they feel qualified. Similarly situated applicants are treated equally.

PROMOTIONS

95. Most people hired at defendants' facilities are persons entitled to a rehire preference or are hired from the external labor market rather than through promotions or transfers from another position or department within the cannery.

96. There are very few midseason vacancies in jobs. There is not time during the season to fill such vacancies through a posting, application, interview and training procedure.

97. Most higher paying positions within a department are not filled from the lower paying positions within the same department at a cannery.

98. Midseason promotions or transfers across union and/or departmental lines are rare.

99. Promotions or transfers across departmental lines from one season to the next are rare.

100. Many of the spring and fall laborers hired by defendants are not available for employment during the summer season because they choose to fish instead.

REASONABLE BUSINESS PRACTICES AND BUSINESS NECESSITY

101. The job preference clause operates like a

seniority system.

102. Because of the intensity of the salmon run, the high cost of error, and demands placed upon the cannery, experienced applicants are given priority over inexperienced applicants even though both possess the same general skills.

103. Local 37 provides an oversupply of nonwhite cannery workers for all defendants' canneries except Ekuk.

LABOR MARKET

104. The employees in the various job classifications are not fungible. Each job or job department requires differing qualifications, primarily skill and/or experience. Preseason availability is often an important qualification. Defendants must look to the labor market providing individuals with the skills and experience required by each job. Many noncannery workers' jobs require skills and qualifications not possessed by nor readily acquirable within a reasonable time by unskilled, inexperienced persons at the canneries.

105. The racial composition of cannery workers and laborers at defendants' facilities is predominently nonwhite. This is so because Local 37 is the primary source of nonresident cannery workers for all but one of defendants' facilities, and the membership and leadership of Local 37 is predominently Filipino.

106. Filipinos constitute about one percent (1%) of the population and approximately one percent (1%) of the labor force (over age eighteen) in the geographical region

from which defendants draw their employees, that is, Alaska, the Pacific Northwest, and California.

107. The available labor supply in this relevant geographical area for cannery worker, laborer, and other nonskilled jobs is approximately ninety percent (90%) white. Nonwhites, particularly Filipinos and Alaska Natives, are thus greatly overrepresented in these jobs at the defendants' canneries.

108. Local 37, ILWU, has not asserted jurisdiction rights over non-resident cannery workers at Ekuk. Starting in 1971, Ekuk hired non-resident cannery workers without utilizing a Local 37 cannery worker foreman or the union in any way. The percentage of Filipino nonresident cannery workers hired by Ekuk is significantly less than the percentage of Filipinos hired as nonresident cannery workers at Red Salmon, Bumble Bee, Wards Cove, and Alitak - all four of which have a contract with Local 37 to supply *nonresident* cannery workers.

109. Alaska Natives constitute only a small portion of the overall *general* population in the section of Alaska where canneries are located. However in those remote, sparsely populated ares which are immediately adjacent to the canneries at Naknek, South Naknek, Alitak, and Ekuk, the native population is a significantly greater percentage than it is compared to the general Alaskan population which includes the predominately white city populations. Consequently, Alaska Natives comprise a high percentage of the local labor market for *resident* cannery workers and laborers at the canneries located at Naknek, South Naknek, Alitak, and Ekuk. For the same reason, that is, because of its Ketchikan location, the percentage of

Alaska Natives hired at Wards Cove is significantly less than the percentage of Alaska Natives hired as resident cannery workers at the other four facilities. This is so because the area immediately adjacent the Ward Cove Cannery is not sparsely populated.

110. Persons filling cannery worker and laborer jobs are not part of the labor supply for jobs requiring differing qualifications at defendants' facilities. Defendants' cannery workers and laborers do not form a labor pool for other jobs at defendants' facilities.

111. A Local 37 cannery worker who is transferred during the season to a job under another union's jurisdiction can claim both his season guarantee as a cannery worker in addition to his earnings in the new position.

112. Company policy has been to hire workers from without rather than to transfer or promote from within.

113. Most cannery worker and laborer jobs do not provide training for other work in the cannery. The skills acquired in most cannery worker and laborer jobs are not a substitute for the experience and skill requirements of the skilled non-cannery worker jobs.

114. The end of each canning season terminates the employment of cannery workers.

115. The older Filipinos tend to dominate the other cannery workers in requests covering matters such as housing and messing.

116. There has been a general lack of interest by

cannery workers in applying for noncannery workers jobs.

117. Most cannery worker jobs do not require that the employees be able to communicate effectively, or be literate, in the English language and none of them require early season availability. Most other jobs at the canneries require both of these qualifications.

118. Most students are not available for preseason work required in most noncannery worker jobs.

119. Most of the jobs at the canneries entail migrant, seasonal labor. While as a general proposition, most people prefer full-year, fixed location employment near their homes, seasonal employment in the unique salmon industry is not comparable to most other types of migrant work, such as fruit and vegetable harvesting which, for example, may or may not involve a guaranteed wage.

120. Thus, while census data is dominated by people who prefer full-year, fixed-location employment, such data is nevertheless appropriate in defining labor supplies for migrant, seasonal work.

121. Based on a sample of almost one-half of the industry, 48% of the individuals employed in the Alaska salmon canning industry during 1970-78 were nonwhite. This is so primarily because nearly all employed in the "cannery worker" department are non-white. The institutional factor of Local 37's over-representation of non-whites accounts for this statistic. Accordingly, the court does not assign considerable weight to this statistic.

122. The percentge of nonwhites employed in the Alaska salmon canning industry during 1906-39 and 1941-55 has historically been from about 47% to 70%. Toward the end of this period it has stbilized at about 47% to 50%.

123. Eighty-eight percent (88%) of the class members are Alaska Natives or of Filipino descent. Defendants' labor market data proved that the percentage of whites hired in the following jobs in the aggregate by facility or by combination of facilities is either less than the percent of whites in the labor supply or does not exceed the percentage of whites in the relevant labor supply by a statistically significant amount. In only a few instances does the percentage of whites hired in these jobs aggregated by department exceed the percentage of whites available in the relevant labor supply; in some instances, nonwhites are over represented in the jobs taken on a department-by-department basis.

Administration: All jobs.

Beachgang: crane operator, gas man, net boss, net man, oil dock, outside foreman, pile buck foreman, setnet pickup, truck driver.

Carpenter: All jobs.

Culinary: baker, cook, cook/baker, steward/baker, steward/cook, steward.

Machinists: diesel operator, electrician, first machinist, machinist foreman, mechanic, port engineer, refrigeration machinist, shop machinist,

welder, machinist helper/electrician, refrigeration machinist/can shop machinist, salmon cook/shop machinist, shop machinist/can shop machinist, shop machinist/pipe fitter, shop machinist/port engineer, shop machinist/fireman.

Tender: captain.

Miscellaneous: all jobs except quality control, janitor, and laundry/cannery worker.

All Year-Round Jobs:

Store/Stockroom: Naknek Trading Company.

Office: Administrative assistant.

Beachgang: beach boss, beachman, pile buck, beachman/truck driver.

Culinary: kitchen help, laundry, waiter/waitress.

Machinists: cold storage machinist, can shop machinist, casing machinist, filler machinist, fireman, iron chink machinist, machinist, machinist helper, machinist helper/oil cook, pipefitter/fireman, pipefitter, salmon cook/ pipefitter, salmon cook, seamer machinist, brite stack machinist/pipe fitter, iron chink machinist/ casing machinist, pipe fitter/oil cook.

Fisherman: company fisherman (captain and partner).

Miscellaneous: quality control, janitor, laundry/ cannery worker.

Office: (except for a few instances where they were seasonal, these jobs are year round), accountant, assistant bookkeeper, bookkeeper, office help, office manager, secretary.

Store/stockroom: stockroom help, stockman, storehelp, storekeeper, Naknek Trading Co. manager.

Tenders: deckhand, mate, mate/deckhand, talleyman, tender engineer, tenderman, tender cook/deckhand.

JOB QUALIFICATIONS

124. At the canneries, defendants do not provide on-the-job training of unskilled, inexperienced persons for jobs requiring skill and experience.

125. Because of the lack of time and personnel available for training at a salmon cannery, skills or qualifications cannot be considered "readily acquirable" unless they can be acquired within a matter of days with a minimal amount of training time required of supervisory and other skilled personnel. To maximize production and minimize the amount of training which must be done at the canneries, defendants attempt to hire experienced persons in all job categories.

126. Qualifications required for any individual position depend to a certain extent on the cannery

involved, the age and condition of equipment, skill level of other incumbents and supervisors, and other such factors. It is not practical or realistic, in terms of running a safe, efficient, and profitable operation to staff each position with people meeting only the stated minimum requirements.

127. Many lower paying jobs (e.g., carpenter apprentice-helper, deckhand, machinist helper, kitchen help) within departments are not "entry level" positions for vacancies in higher paying positions within the same department at defendants' canneries.

128. The skills acquired in most cannery worker and laborer jobs are not a substitute for the experience and skill requirements of the skilled noncannery worker jobs.

129. Below is a composite list by department of all job titles which have been filled at any time, at any of defendants' facilities bewtween 1970-80: (No individual cannery would fill this many job titles in any given season.)

Administration:

Assistant Manager
Assistant Superintendent
Double Star Coordinator
Manager
Purchasing Agent
President
Roe Operations Manager
Sales Manger
Superintendent

Beachgang:

Beach Boss
Beachman
Beachman/Truck Driver
Crane Operator
Dock Manager
Gas Man
Net Boss
Net Man
Oil Dock (including Standard Oil dock crew)
Outside Foreman
Pilebuck
Pilebuck Foreman
Setnet Pickup
Truck Driver

Carpenter:

Carpenter
Carpenter Apprentice
Carpenter/Shipwright
Carpenter Foreman
Caulker
Contract Carpenter
Painter

Culinary:

Baker
Cook
Cook/Baker
Kitchen Help (includes bull cook)
Laundry
Steward/Baker
Steward/Cook

Steward
Waiter/Waitress

Cannery Worker:

Cannery Worker (includes crab and freezer processing workers)

Fisherman:

Company Fisherman (Bumble Bee, Red Salmon and Egegik only)

Machinist:

Brite Stack Machinist/Pipefitter
Cold Storage
Machinist
Can Shop Machinist
Casing Machinist
Diesel Operator
Electrician
Filler Machinist
Fireman
First Machinist
Salmon Butchering Machinist
Salmon Butchering Machinist/ Cashing
Machinist
Machinist Foreman
Mechanic
Machinist Helper/Trainee
Machinist Helper/Electrician
Machinist Helper-Oil Cook
Pipe Fitter/Fireman
Pipe Fitter/Oil Cook
Pipe Fitter

Plant Engineer
Port Engineer
Refrigeration Machinist
Refrigeration Machinist/Can Shop Machinist
Salmon Cook
Salmon Cook/Fireman
Salmon Cook/Pipe Fitter
Salmon Cook/Shop Machinist
Seamer Machinist
Shop Machinist
Shop Machinist/Can Shop Machinist
Shop Machinist/Pipe Fitter
Shop Machinist/Port Engineer
Shop Machinist/Fireman
Welder

Laborer:

General Laborer
Spring/Fall Workers

Office:

Accountant
Administrative Assistant
Assistant Accountant
Assistant Bookkeeper
Bookkeeper
Office Help
Office Manager
Purchasing/Bookkeeper Sales Clerk
Secretary

Store and Stockroom:

Naknek Trading Co. Manager

Stockman

Stockroom Help
Storehelp
Storekeeper

Tenders:

Captain
Deckhand
Mate
Mate/Deckhand
Tallyman
Tender Engineer
Tenderman
Tender Cook/Deckhand (includes Tender Cook)

Miscellaneous:

Affirmative Action Representative
Beachman/Store Helper
Consultant
Double Star Captain
Double Star Carpenter
Double Star Cook
Double Star Cannery Worker
Double Star Deckhand
Double Star Engineer
Double Star Foreman
Double Star Mate
Foreman (Unspecified)
Inventory Control
Janitor
Maintenance
Miscellaneous
Monkey Boat Operator

Nurse
Office Helper/Store Helper
Quality Control
Radio Operator
Recruiter
Roustabout
Store Helper/Kitchen Helper
Traffic Manager
Night Watchman
Winter Laborers and Assistants
Winter Watchman
Winter Watchman
(Employees with no job title are included in this department)

L.U.T. Yard:
Yardworker
Yard Foreman

Certain persons who have appeared on cannery payrolls, but are either not employees (independent fishermen) or who worked on special construction projects and were hired by the constructions project manager are not included in a department.

Virtually all of the jobs in the administration and office job departments are filled by year-round employees who work at company headquarters. As part of their regular job duties, most of them work at company headquarters in the offseason but at the defendants' facilities in Alaska during the salmon processing season. There are also many individuals, primarily in the machinist, carpenter, and tender departments, who are for all practical purposes year-round employees. They work at defendants'

shipyards in the off-season and, as part of their regular job duties, work at defendants' Alaska facilities during the season.

130. The following jobs are supervisory, require management abilities, and extensive experience to successfully perform:

(a) superintendent (manager)
(b) cannery (machinist) foreman
(c) assistant superintendent (assistant manager)
(d) first machinist
(e) office manager
(f) carpenter foreman
(g) beach boss
(h) net boss
(i) setnet pickup boss
(j) tender captain
(k) steward
(l) first cook (if no steward at facility)
(m) outside foreman (Ekuk)
(n) skipper of Double Star
(o) Manager of Naknek Trading Co.
(p) pilebuck foreman

131. The following jobs require substantial prior skill and experience to successfully perform:

(a) port engineer
(b) wet tender (briner) engineer
(c) carpenter
(d) carpenter/shipwright
(e) caulker

(f) shop machinist
(g) refrigeration man
(h) electrician
(i) steward
(j) baker
(k) cook
(1) radioman
(m) doctor
(n) nurse
(o) accountant
(p) company fisherman
(q) welder
(r) pipe fitter
(s) pilebuck
(t) netman
(u) crane operator
(v) cold storage machinist
(w) Double Star engineer
(x) Standard Oil distributorship manager
(y) traffic manager
(z) sales manager
(aa) purchasing agent

132. Qualifications reasonably required for successful performance of the jobs listed below are as follows:

Salmon Butchering Machinist. Requires two seasons experience as a helper-trainee in the fish house with one winter of off-season training or one year of mechanical experience of a similar nature. This job also requires an ability to work with minimum supervision and without the aid of shop manuals, a knowledge of and ability to use mechanic's hand tools for adjustments and repair of equipment, early season availability, and ability

to understand and communicate effectively in English. Must be capable of training a machinist helpertrainee in the fish house if one is employed.

Reformer-Can Shop. Requires two seasons as machinist helper-trainer in cannery or six months mechanical experience of a similar nature. Job requires the ability to work without close supervision, knowledge of and ability to use seam micrometers, gauges and mechanic's hand tools to comprehend, and communicate effectively in English, understand mechanical drawings, and possess leadership skills. Early season availability is also required.

Fillerman. Requires two seasons as machinist helper-trainer on the canning line with one winter of off-season training, or one year of mechanical experience of a similar nature. Knowledge of and ability to use mechanic's hand tools to make adjustments and repairs to equipment is required. Ability to read, comprehend, and communicate effectively and availability are required. Leadership skills may also be required.

Filler Operator. See machinist helper-trainee.

Seamerman. Requires two seasons experience as a machinist helper-trainee in the cannery or six months mechanical experience of a similar nature. Ability to read, comprehend, and communicate effectively in English is required. Knowledge of and ability to use mechanic's hand tools to make adjustments and repairs to equipment is required. Early season availability is also required.

Seamer Operator. See machinist helper-trainee.

Salmon Cook-Pipefitter. Requires one year of plumbing and/or pipefitting experience, less depending on amount and type of expeience with boilers or pressure vessels. Job requires proficiency in basic mathematics, ability to read gauges and thermometers, and ability to handle the strain, responsibility, and pressure of "cooking" as many as nine retort loads of salmon simultaneously. Must have knowledge of and ability to use mechanic's and pipefitter's tools to make adjustments and repairs. Must be able to understand and accurately complete required inspection and report forms required by governmental agencies and industry associations. Early season availability is also required.

Machinist Helper-Trainee. Requires mechanical ability, knowledge of and ability to use mechanic's tools. Must be flexible, willing to learn, and to follow directions. Must be able to communicate effectively in English and have the ability to read and comprehend English if placed in canning line or can shop. Early season availability is required.

Fireman. Requires mechanical ability, ability to use mechanic's and some pipefitting tools, and early season availability. (In addition, for the above machinist crew jobs, possession of at least one of the following additional skills is highly desirable and preferred in hiring: welding, pipefitting, electrician, and machine shop; requires willingness and ability to work independently or with other crew members in performing a wide variety of maintenance and repair tasks on cannery buildings, grounds, fixtures, and equipment).

Quality Control. Requires ability to read, compre-

hend, and communicate effectively in English, ability to check weights, record temperatures, and use basic mathematics through decimals. Must have ability to handle detail, be able to handle reports and paperwork, be reliable, and be honest. One season of general cannery experience or other relevant experience or education, such as food technology, is required.

Beachman. Requires good health, and the capacity for and ability to perform heavy work out-of-doors. Requires familiarity with wide range of hand tools (both mechanical and carpentry), small power tools, and operation of forklifts and other equipment. Minimum qualification requirements vary depending on size of beachgang: the larger the beachgang, the greater the ability to take on less skilled personnel. Minimum qualifications for a new beachman joining a crew of three or more beachmen (not including beach boss) would be three to six months prior heavy work experience, preferably out-of-doors and construction or shipyard related.

Dry Tender Engineer. Requires one year of related boat experience or six months engine mechanical experience and one season of tender experience, knowledge of and ability to use mechanic's and some pipefitting tools to make adjustments and repairs to shipboard machinery and equipment, ability to live in small quarters and function as an effective member of a small group. Willingness and ability to work long hours on oceangoing vessel is required. Ability to act as relief helmsman and back-up navigator may be required on some boats.

Accountant. For portion of job performed in Alaska, see Bookkeeper.

Bookkeeper. Requires two years formal bookkeeping education or comparable work experience, familiarity with use of computers in data processing depends on location, typing and ability to accurately operate ten-key calculator. Two seasons as assistant cannery bookkeeper would also satisfy requirements. English literacy and preseason availability are required.

Assistant Bookkeeper. Requires knowldge of basic bookkeeping, basic mathematics, familiarity with use of computers in data processing depends on location. Job also requires ability to use typewriter and accurately operate ten-key calculator. English literacy is required. Preseason availability required.

Office Assistant/Bookkeeper-Helper. Requires knowledge such as would be obtained from office practice training course or comparable work experience, knowledge of basic mathematics, ability to type, and ability to accurately use ten-key calculator. Preseason availability may be required. English literacy required.

For those of the above jobs which may be year-round, the stated qualifications do not necessarily deal with the off-season requirements of their jobs.

133. The qualifications necessary to successfully perform the remaining jobs are as follows:

Deckhand: Aptitude for marine work, early season availability, willingness to work long, irregular hours on ocean-going vessel. Marine experience preferred. English language required.

Tender Cook/Deckhand: Cooking experience, amount and type depends on location, aptitude for marine work, willingnes to work long irregular hours in cramped quarters on ocean-going vessel, early season availabilitiy, English language requied, marine cooking experience preferred.

Company Fishing Boat Partner: Determined by captain, but generally fishing experience and aptitude for marine work, willingness to work long hours on very cramped ocean-going vessel, and willingness to work on a "share" basis (that is, without any guaranteed wage, wage rate, or salary).

Carpenter Apprentice: Aptitude for carpentry work. Early season availability. Carpentry work experience preferred. English languge required.

Truck Driver and Setnet Pickup. Driving experience, amount and type depends on truck involved. Driver's license. English language required.

Stockman. English literacy; record keeping ability; knowledge of hardware, machinery, and parts.

Storekeeper. Requires knowledge of and ability to perform record keeping and basic bookkeeping, maintain credit records, manage inventory records, ordering of supplies. Must be physically able and willing to stock shelves. Early season availabiltiy required. At larger stores (Ekuk, Chignik, Bumble Bee) must have considerable retail experience. At smaller stores (Alitak, Port Bailey, Keni) must have some retail experience. English literacy.

Storekeeper At Wards Cove. Must have driver's license, physical strength, and English literacy.

Winter Watchman and Caretaker. Must be responsible individual willing to spend several months in winter weather at very isolated locations. Qualifications depend somewhat on location, but generally person must have the skill and ability to diagnose, maintain, and effect repairs on various cannery equipment and buildings.

134. The parties agree that no prior special skills are necessary to perform the following miscellaneous jobs: gasman or oilman, apprentice carpenter, carpenter's helper, winter watchman, night watchman, AFU waiter, and AFU dishwasher. The court finds that all at-issue (noncannery and non-laborer) jobs are skilled positions except for the following titles:

1. Piledriver
2. Kitchen help
3. Waiter/Waitress
4. Janitor
5. Oildock Crew
6. Night Watchman
7. Tallyman
8. Laundry
9. Gasman
10. Roustabout
11. Store Help
12. Stockroom Help
13. Assistant Caretaker (winter watchman and watchman's assistant)
14. Machinist Helper/Trainee
15. Deckhand
16. Apprentice Carpenter/ Carpenter's Helper

INCIDENTS OF RACE-LABELING AND RACIAL COMMENTS

135. Various memos written by agents of defendants during the period of 1970 to 1973 and occasionally later included the following references: "Filipino cannery workers", "Native cannery workers", "Native Galley Cook", "Filipino Mess", "Eskimos", "Filipino, Eskimo, Women", "Young native boys", "the Filipino Union", "white boys", "Native crew", and "Phillipine Bunkhouse". See e.g., Exh. 245, 254, 300, 322-26, 330-37, 397, 452, 721

136. A memo dated May 15, 1976, from John Korzan states, "In 1975 we ordered 175 badges numbering one thru 175 for use in our cannery for purposes of identifying our Eskimo cannery workers". Exh. 458.

137. BBS's company personnel records listed employee number badge assignments as follows:

BADGE ASSIGNMENT

01-1 thru 01-99	Company Fishermen
02-100 thru 02-149	Lease Fishermen
02-150 thru 02-299	Independent Fishermen
02-300 thru 02-399	Setnetters
03-400 thru 03-429	Power Scows
04-430	Beach Boss
05-431 thru 05-440	Beach Gang and Truck Drivers
06	Fish Boss
07	Net Boss
08-445 thru 08-474	Machinists
09-475 thru 09-524	Girls
09-525 thru 09-574	Filipinos

09-575 thru 09-659	Natives
09-660 thru 09-674	Miscellaneous
10-675 thru 10-699	Carpenters
11-700 thru 11-729	Commissary
12-730 thru 12-739	Labor
13-740 thru 13-750	Other Labor

Exh. 467.

138. Laundry for nonresident cannery workers at Wards Cove was stored in bags marked "Oriental Bunkhouse", and the mail slot where the nonresident cannery workers received their mail was similarly marked.

139. A letter from A. W. Brindle dated December 15, 1970 states:

> There is one more thing I want to tell you that probably will happen. We built a new bunkhouse. We expected to move all the carpenters and all the machinists into it. Apparently this is not working out due to the beachmen coming in and out. I have considered now taking the room that Vern used to have and the two rooms that Ned had and making those rooms into a room for the beachmen and putting a shower in so they would be away from the fishermen. The (sic) come in and out at night and it would be quieter for them. I would then use the new bunkhouse for women. The reason for this is these Eskimos are completely impossible. We have nothing but trouble and we probably had less trouble than the majority. Nelbro for instance had 43 quit one morning. We had all of ours refuse to go to work on July 2nd at 8 o'clock until I agreed to give them additional pay over and above the

contract.
Exh. 4527.

140. A memo from Winn F. Brindle dated December 29, 1972 states:

> This letter from Frank B. Peterson is to give Salvador a bit of status in the community. As you well know, the Filipinos both at home and abroad are difficult to deal with.

Exh. 253.

141. A May 25, 1970 memo from Don Ballard to the Seattle office of WCP states in part:

> Hardy, could you check with Mayflower press about those little square pre-printed cards for the buttons. We should have had them up here before now, we got 24 Eskimos in yesterday and I would like to get these things made up so I know who they are and also to keep the other bums out of the Mess Hall.

Exh. 454.

MESSING

142. As stated earlier, Filipino and Asians are overrepresented in Local 37.

143. The bargaining representative for nonresident cannery workers have traditionally asked for Oriental and Filipino food, and a separate menu for its members. Management has acceded to these wishes. The older persons in the Local 37 crews prefer this arrangement.

144. The Local 37 contract provides for a separate culinary crew for the Local 37 crew.

145. The quality and quantity of food served in mess halls is the responsibility of the cook in the mess hall. Most complaints about the food can be traced to matters of personal taste or competence of the cook.

146. Defendants have ordered special food for the nonresident cannery worker mess halls in accordance with the Local 37 union leaders' or cooks' desires without unreasonable budgetary restrictions.

147. The few whites in Local 37 ate with the Filipinos in the Local 37 mess. See testimony of David Yoshizumi.

HOUSING

148. In response to a written inquiry about employment, Hardy Parrish in a letter dated January 25, 1971, wrote:

> We are not in a position to take many young fellows to our Bristol Bay canneries as they do not have the background for our type of employees. Our cannery labor is either Eskimo or Filipino and we do not have the facilities to mix others with these groups. Another thing is the time element, most of the college boys do not get out of school early enough to fit in with our requirements.

Exh. 251.

At the time of writing this letter, Mr. Parrish was

a cannery foreman for WCP. Presently, he is cannery superintendent for CWF at Kenai, Alaska.

149. While defendants have made significant improvements in all worker housing, from 1970 to 1973, and while most of defendants' employees live in integrated bunkhouses, housing where non-whites predominate has generally been poorer than housing whites predominate. However, any differences in housing quality are not attributable to the race of the occupants. Instead, differences are attributable to the following industrial circumstances:

A. Workers are generally housed according to job department and time of arrival. The larger cannery worker bunkhouses are not opened up during the preseason, but rather, are prepared within a few days of the anticipated beginning of the salmon run at each location which is when the cannery crews arrive. By this time, most other employees have already begun working, are housed, and there are few, if any, spaces available except in the cannery worker bunkhouses.

B. Since cannery workers are housed for the shortest period of time (during the summer), they do not need the better insulated buildings required for the noncannery worker employees who arrive at the cannery earlier and stay later.

C. Generally, persons working in different departments do not work the same shifts.

INDIVIDUAL INSTANCES

150. In May of 1977, Moses Friendly, who is of Alaska Native descent, applied to defendants in writing for a summer clerical job, but was not hired.

151. In May of 1976, Jimmie Akanakyak, who is of Alaska Native descent, applied to defendants in writing for a storekeeper job in 1976, but was not hired in that job that year.

152. In February of 1977, Kim Tsijui, who is of Japanese descent, applied in writing for a waitress or clerical summer job, but was not hired in any job.

153. Ed Daba, who is of Filipino descent, applied on April 30, 1976, in writing for a job as tender deckhand, as a machinist trainee or in another noncannery worker job, but was not hired. At the time of his application, all noncannery jobs had been filled.

154. Orlando Bucsit, who is of Filipino descent, applied orally to Ward Cove Cannery superintendent Joseph Brindle and at 88 East Hamlin for a job on a tender in 1980, but was not hired in that job.

155. Richard Gurtiza, who is of Filipino descent, applied orally to Ward Cove Cannery superintendent Joseph Brindle for a job which was about to open up on a tender part way into the 1977 season. He was not hired in that job. However, after the season was over Joseph Brindle allowed Richard Gurtiza to work on a tender for the seven-day trip south to Seattle.

156. In May of 1971, Clark Kido, who is of Japanese descent and was a student, applied at East Hamlin

for a carpenter job, machinist job or other noncannery worker job orally and in writing, stating he could be available in mid-May, by arranging to complete his final exams early. In late April or early May of 1975, Mr. Kido similarly applied for interim employment. At that time Mr. Kido had been laid off as a full-time structural engineer at Boeing. Both times he was instructed no openings existed. Mr. Kido previously worked for defendants as a cannery worker. The jobs for which he applied, however, required preseason availability and were filled in early spring.

157. Carlos Garces, who is of Mexican descent, applied in writing and orally in March of 1976, asking for any job at Ekuk or at any other cannery. Mr. Garces had no experience, had an educational background in mechanical engineering but did not so state on his application. However, Mr. Ekern, with whom Mr. Garces spoke at the time he applied, did not ask Mr. Garces his qualifications. His status at the time of application was that of student.

158. Charles Tangalan, who is of Filipino descent, felt uncomfortable applying for a noncannery job because he thought Filipinos who worked in the cannery were supposed to be on the cannery crew. In addition, he felt he would be unable to get a job outside the cannery because he was not related to other company employees. Thus, he did not apply for other jobs.

159. Frank Atonio, who is of Samoan descent, inquired orally of Wards Cove cannery foreman Ray Landry regarding machinist jobs on a Sunday in 1973. He inquired orally at the end of the 1973 season of Wards Cove Cannery superintendent Joseph Brindle for a

machinist, carpenter or tender job; and orally at the end of the 1973 season to the Ward Cove bookkeeper Jerry Steele concerning a tender or clerical job but was not hired at that time. Mr. Atonio did not disclose any qualifications, and he was not asked about qualifications. He did not follow through with a written application, and his inquiries came at a time when the jobs had been filled for the season. Mr. Atonio was employed in noncannery jobs (beachgang and tender/deckhand) in 1979 and 1980. His applications for these jobs were made preseason. He was rehired for the 1981 season for a job as a tender deckhand at the Kenai facility but quit before the boat departed.

160. In 1966 or 1967, during the canning season, Mike Eddie Antonio, who is of Filipino descent, orally inquired of the Red Salmon beach boss, Vern Jones, about how one went about getting a beach gang job. In 1966 or 1967, Mr. Antonio orally asked the Red Salmon head machinist how one goes about getting a machinist's job.

161. In 1973, Ronald Barber, who is of Filipino descent, was a student, and worked seasonally for various canneries, orally asked Ward Cove (cannery worker) foreman Salvador del Fierro for a quality control, clerical, storekeeper or machinist helper job, but was not hired for these jobs. Mr. Barber's requests were directed at an employee without hiring authority for those jobs. The inquiries were made during the season when those positions were already filled.

162. Andy Pascua, who is of Filipino descent, worked at Red Salmon in 1970 and 1971 but did not apply

for a machinists job during those years. Mr. Pascua did inquire of a Red Salmon employee as to how one would go about getting such a job. Mr. Pascua's inquiry, however, was directed at an employee with no hiring power.

163. Lester Kuramoto, who is of Japanese descent, worked as a cannery worker at Ward Cove Cannery during the summers of 1970, 1971, 1972 and 1973 and worked as a cannery worker at Bumble Bee cannery during the summer of 1971. He applied orally in 1971 at 88 East Hamlin for any job.

164. Gene Viernes, who was of Filipino descent, worked at Red Salmon during the summers of 1969, 1971, and 1972 and at Ward Cove during the summers of 1966, 1969 and 1973. In 1973, Mr. Viernes was fired for dropping and driving over canned fish he was transporting with the fork lift. In 1977, he orally inquired of Alec Brindle about getting hired as a cannery worker for that season, but was not hired.

165. William T. Pascua, who is of Filipino descent, worked for Ward Cove Packing at Red Salmon during the 1971-1972 seasons. While at Red Salmon, Mr. Pascua wanted a clerical or quality control job, but did not ask for one because he believed that Andy Pascua and Gene Viernes had unsuccessfully inquired about such jobs.

166. Benjamin Tabayoyon, who is of Filipino descent, worked for Ward Cove Packing at Red Salmon during the 1969-1971 seasons. During those seasons he inquired of the machinists and fishermen how they got their jobs.

167. Eugene Baclig, who is of Filipino descent, worked at Red Salmon during the 1969-72 seasons and at Ward Cove Cannery during the 1973 season. He did not apply for jobs other than a cannery job because the upper level jobs appeared to him to be all white.

168. Phillip Fujii, who is of Japanese descent, worked at Wards Cove Cannery during the summer of 1972. He was interested in a machinist job, but did not apply because he did not know what qualifications were necessary and what openings existed. Also, he did not see any Japanese or other non-whites working at Wards Cove, and overheard other employees say that one had to have connections or past experience to receive a high paying position.

169. Randy del Fierro, who is of Filipino descent, worked as a cannery worker for Wards Cove Packing at Wards Cove Cannery in the 1970, 1972 and 1973 seaons; he worked at Alitak in the summer of 1971. Mr. del Fierro's grandfather, Salvador del Fierro, was foreman at Wards Cove Cannery in 1970, 1972 and 1973. Mr. del Fierro did not apply for an upper level job because he was told by members of his crew that job segregation was "just the way it was". Ct. Rec. 710 at 2, 11. 30-31. In addition, he saw few minorities occupying positions other than cannery worker positions.

170. Curtis Lew, who is of Chinese descent, worked at Wards Cove Cannery during the 1972 and 1973 seasons. He felt he was qualified for jobs other than as a cannery worker, but never told anyone about his qualifications because he did not believe there was any way he could advance due to the lack of posted openings and racial

imbalance among the jobs.

171. Joaquin Arruiza, who is of Filipino descent, worked at Bumble Bee Cannery during the 1971, 1972 and 1973 seasons, and was interested in jobs outside the cannery crew. However, he never saw a written announcement, and no one informed him of promotional opportunities.

172. Allen Lew, who is of Chinese descent, worked at Wards Cove Cannery during the summers of 1972 and 1973. At that time, he was a full-time student at the University of Washington and not available for preseason work. Mr. Lew did not know how the defendants employed persons in the upper level jobs. It was Mr. Lew's impression that he would have been qualified for quality control, tenderman, and bookkeeper positons, but he remained a cannery worker.

DISCUSSION

JURISDICTION:

As stated earlier, this action challenges employment practices by WCP, BBS, and CWF under Title VII and under Sec. 1981. Except for CWF, exhaustion requirements have been met or waived, *Zipes v. Trans World Airlines*, ____U.S.____, 50 U.S.L.W. 4238 (Feb. 23, 1982), and jurisdiction exists in this court. With respect to the Title VII claims against CWF at Alitak and Ekuk, Judge McGovern dismissed all such claims, and the Ninth Circuit affirmed the dismissal because the claims were time barred. *Atonio v. Ward Cove Packing Co., Inc.*, 703 F.2d 329, 331 (9th Cir. 1982). Plaintiffs urge in their Supple-

mental Final Argument that since WCP and BBS are essentially joint venturers, the two should be liable for any Title VII claims against CWF. However, this court is bound by the Ninth Circuit's ruling affirming the dismissal of the claims in question. Accordingly, the court may not now utilize the joint venture theory to find liability on claims which no longer exist.

BURDEN OF PROOF:

At the outset, it should be noted that Section 1981 "does not embody the same broad prophylactic purpose as does Title VII". *Gay v. Waiters' and Dairy Lunchmen's Union, Local No. 30*, 694 F.2d 531, 537 (9th Cir. 1983). Therefore, a plaintiff suing under Sec. 1981 must show intentional discrimination to establish a *prima facie* case. *Id.* Under Title VII, however, there are two theories of liability, the "disparate treatment" model and the "disparate impact" approach. A *prima facie* "disparate impact" case may be established without any proof of intentional discrimination. Instead, where a business practice, which is neutral on its face, is shown to have a significant, adverse impact upon a class protected by Title VII, the plaintiff has made out a *prima facie* case, and the burden of proof shifts to the defendant to show that the practice is justified by "business necessity". *Contreras v. City of Los Angeles*, 656 F.2d 1267, 1275-80 (9th Cir. 1981). Thus, good intent is not a defense in "impact" cases. *Gay*, 694 F.2d at 537. Under the "disparate treatment" mode, certain individuals are singled out, and treated less favorably than others based upon race, religion, sex or national origin. *International Brotherhood of Teamsters v. United States*, 431 U. S. 324, 335-36 n.15 (1977).

Treatment cases, like Sec. 1981 claims, require proof of intentional racial discrimination. *Gay,* 694 F.2d at 537. While the "burden of proof" shifts in "impact" cases, in "treatment" actions the burden which shifts to defendant after establishment of a prima facie case is only a burden of "production". It is clear the burden of persuasion remains with the plaintiff. *Texas Dept of Community Affairs v. Burdine,* 450 U.S. 248, 257 (1981); *Gay,* 694 F.2d at 537, n.4. *Prima facie* disparate treatment (and Sec. 1981) is established by proof of facts sufficient to support an inference of intentional discrimination. *Furnco Construction Corp. v. Waters,* 438 U.S. 567 (1978). But see, *United States Postal Service v. Aikens,* ___U.S.___, 103 S. Ct. 1478, 1482 (1983) (when a defendant fails to persuade the district court to dismiss for lack of a prima facie case, the fact-finder must decide whether defendants' conduct was intentionally discriminatory regardless of whether plaintiff really made out a *prima facie* case).

It must be decided whether the disparate treatment or the disparate impact theory, or both, applies to plaintiffs' Title VII claims in this action. If both apply, it must be decided whether both apply to all aspects of the action. Plaintiffs argue that both models of liability are applicable. Defendants counter that only the treatment theory is appropriate here since the allegations are of wideranging discrimination. Until recently, the answer to this question was relatively easy. In *Heagney v. University of Washington,* 642 F.2d 1157, 1163 (9th Cir. 1981) the court found that the impact model only applied to "objective" employment practices:

> It is apparent, however, that the creation of jobs that are exempt from the Washington personnel

> law cannot be equated with such well-defined objective employment practices as personnel tests or minimal physical requirements. Classification of certain jobs as "exempt" only meant that the University had wider discretion to establish the employee salaries. Subjective employment decisions may result in discrimination, but the use of subjective criteria is not per se illegal. [Citation omitted.] The gravamen of Heagney's complaint is that the lack of well-defined employment criteria allowed a pattern or practice of discrimination to exist. We therefore conclude that "impact" analysis is inappropriate and that Heagney was required to prove disparate treatment.

Accord, *O'Brien v. Sky Chefs, Inc.*, 670 F.2d 864 (9th Cir. 1982). As recently discussed in *Moore v. Hughes Helicoptors, Inc.*, 708 F.2d 475, 481 & n.4 (9th Cir. 1983), there is a split among the courts of appeal on the applicability of the impact model to subjective employee selection practices, and the *Heagney* approach is consistent with holdings in the Fourth, Fifth, Eighth, and Tenth Circuits. See, *e.g.*, *Pope v. City of Hickory, N.C.*, 679 F.2d 20, 22 (4th Cir. 1982); *Pouncey v. Prudential Insurance Co. of America*, 668 F.2d 795, 800-01 (5th Cir. 1982); *Harris v. Ford Motor Co.*, 651 F.2d 609, 611 (8th Cir. 1981); *Mortensen v. Callaway*, 672 F.2d 822, 824 (10th Cir. 1982). However, after *Heagney* was decided, in *Wang v. Hoffman*, 694 F.2d 1146, 1147 (9th Cir. 1982), the court of appeals took a contrary position to *Heagney* without citation to that case. The *Wang* majority concluded that "to prevail on his [impact] theory, Wang need only demonstrate the lack of objective criteria and a disparity in job promotions." *Id.* at 1148. The *Moore* court, *supra*, 708 F. 2d at 481-82 recog-

nized that the law in this circuit is unsettled, but did not find it necessary to resolve the rule at that time. While the *Wang* approach may find support from the Sixth Circuit, *Rowe v. Cleveland Pneumatic Co.*, 690 F.2d 88, 95 (6th Cir. 1982), until the Ninth Circuit by *en banc* opinion specifically overrules *Heagney* and its progeny, this court is bound by its rule since it predates *Wang.*

The conclusion that subjective decision making is not susceptible to the impact approach does not dispose of the impact model for all areas of this case. Rather, there are aspects of the *Wang* case which survive the *Heagney* rule and bear upon issues before this court. That is, to the extent there is a language skills requirement (speaking English) for the at-issue jobs, such a requirement arguably should be deemed "objective" and is therefore properly addressed by impact analysis, since on its face, it would have a disparate impact on minorities. While this issue is not squarely addressed by the parties, it is the conclusion of this court that given the nature of the cannery business, defendants met their burden of proof in demonstrating business necessity for a language requirement in upper level jobs. Specifically, the industry labors under the scrutiny of strict health regulations. The slightest mistake in calibrating can size or in retort management, for example, could result in a threat of wide-spread botulism, a disease fatal to humans. Fishermen who are unable to quickly communicate with one another may place themselves and others in great peril during stormy ocean weather. There is insufficient time and personnel for exhaustive training in this unique seasonal industry which deals with highly perishable food products.

Another area which must be analyzed separately from the intentional discrimination model concerns the pervasive incidence of nepotism at the canneries. Recently, the Ninth Circuit Court of Appeals held that a shareholder preference plan in which shareholder ownership was concededly limited to persons of Italian ancestry and were either members of the family or close friends of a current shareholder was susceptible to impact analysis. *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297, (9th Cir. 1982). Particularly, this was so because the company in *Bonilla* tied preferential wages and job assignments to ownership of its stock. Consequently, the undisputed nepotistic preference plan was a condition of employment. *Id.* See, also, *Gibson v. Local 40, Supercargoes & Checkers, Etc.*, 543 F.2d 1259, 1268 (9th Cir. 1976)(evidence of purpose to discriminate is unnecessary where employee is hired solely because of his relationship to other employees). Relatives of whites and particularly nonwhites appear in high incidence at the canneries. However, defendants have established that the relatives hired in at-issue jobs were highly qualified for the positions in which they were hired and were chosen because of their qualifications. In addition, plaintiffs' nepotism figures failed to differentiate those persons who became related through marriage after starting work at the canneries. Consequently, the nepotism which is present in the at-issue jobs does not exist because of a "preference" for relatives. *Id.*[1]

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[1] Plaintiffs' evidence established that some nonwhites were hired in cannery positions through Local 37 due to relationship with other union cannery workers. However, these positions are not in question, and this evidence has little, if any, bearing upon the at-issue jobs. The Union has not been named as a defendant and the named defendants

Having concluded that the language requirement and incidence of nepotism do not separately constitute impact violations of Title VII under the circumstances presented by this action, both must nevertheless be considered singly and collectively together with plaintiffs' evidence of defendants' failure to post openings, general lack of objective job qualifications, lack of a formal promotion procedure, and the practice of rehiring past employees in their old jobs to determine whether an inference of intentional discrimination has been raised. The court would further note that should plaintiffs prove that they were prevented from obtaining seniority because of defendants' discriminatory hiring practices, the rehire practice must then be separately evaluated to determine whether the effects of the past discriminatory hiring practices (if established) was perpetuated through the rehire practice. Presumably, in such a case, the rehire practice could constitute a separate Title VII violation, regardless of whether defendants acted with a discriminatory purpose. *See Gibson*, 543 F.2d at 1268. *Accord, Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297 (9th Cir. 1982). For reasons to be discussed, *infra*, such an analysis is inapplicable here.

SKILLS:

As earlier stated, all at-issue (non-cannery and non-laborer) jobs are skilled positions except for the following titles:

1. Piledriver

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may not be held vicariously liable for union conduct. *General Building Contractors Association, Inc. v. Pennsylvania, et al.*, 102 S.Ct. 3141, 73 L. Ed. 2d 835 (1982).

2. Kitchen help
3. Waiter/Waitress
4. Janitor
5. Oildock Crew
6. Night Watchman
7. Tallyman
8. Laundry
9. Gasman
10. Roustabout
11. Store Help
12. Stockroom Help
13. Assistant Caretaker (winter watchman and watchman's assistant)
14. Machinist Helper
15. Deckhand
16. Apprentice Carpenter/ Carpenter's Helper

It may be that under a different factual setting, some of the positions which this court finds to be skilled, *e.g.*, truckdriving on the beach, fit into the category of jobs which require skills that are readily acquirable by persons in the general public under *Hazelwood School District v. United States,* 433 U.S. 299, 308 & n.13 (1977). However, what is readily acquirable under the circumstance of a full-year operation such as the setting in *Teamsters, supra,* is not readily acquirable in the salmon cannery industry.

With respect to the machinist helper/trainee; apprentice carpenter, and carpenter's helper; and deckhand positions, although such postions are essentially unskilled, preseason availability is a necessary qualification.

STATISTICS:

Plaintiffs rely upon two types of statistics, ones which allegedly show that non-whites were under-represented in the upper-level jobs when compared with the percentage of non-whites in the available labor supply claimed by plaintiffs and "comparative" statistics which show a pattern of job segregation throughout the cannery work forces.

When full-year, fixed location employment is at issue, the population of some portion of the surrounding community is normally taken as the labor supply. *Hazelwood School District v. United States,* 433 U.S. 299 (1977). However, defining an employer's labor supply is a question of fact, *Williams v. Owens-Illinois, Inc.,* 665 F.2d 918, 927 (9th Cir. 1982), and courts "must be flexible in defining the relevant labor market". *Domingo v. New England Fish Co.,* 445 F. Supp. 421, 433 (W.D. Wash. 1977).

Here, as in *Domingo,* plaintiffs incorrectly assume that the historical general hiring percentages in the industry as a whole mean that defendants hired nonwhites in the same percentage as their availability in the labor market. *Id.* However, the evidence does not support such a conclusion because of institutional factors which greatly distort the racial composition of the workforce. *Id.* The most significant example is the circumstance that Local 37, which dispatches non-resident cannery workers, is almost entirely Filipino. *Id.*

Stated differently, this court is unable to assign significant probative value to plaintiffs labor supply statis-

tics because the plaintiffs' data base premise does not reflect the important factor that Alaskan Natives and Filipinos, combined, represent only about one percent of the population of Alaska, Washington, and Oregon from which state defendants draw their workforce.

Plaintiffs' statistical evidence showed significant disparities between the at-issue jobs and the total workforce at the canneries. Such comparative statistics are highly probative of discrimination pattern or practice where, as here, the positions enumerated at page 63 are essentially unskilled or involve skills that many persons possess or can easily learn. *Piva v. Xerox Corp.*, 654 F.2d 591 (9th Cir. 1981). *See, also, Moore v. Hughes Helicopters, Inc., supra*, 708 F.2d at 483. Thus, the court concludes that plaintiffs established a *prima facie* case of intentional discrimination with respect to the positions enumerated at page 63. Nevertheless, defendants satisfied their burden of production and plaintiffs failed in their ultimate burden of persuasion for the reasons earlier stated and for the reasons discussed *infra*. Of particular significance to the court in making this finding, was the lack of evidence of early and formal applications, to be distinguished from oral inquiries. I have excluded from my consideration the positions of winter watchman and winter watchman's assistant since those positions are not seasonal. Consequently, the latter two positions would not be available to students, and evidence of other class interest was not presented.

Relying upon *O'Brien v. Sky Chefs, Inc.*, 670 F.2d 865, 867 (9th Cir. 1982), plaintiffs argue that their evidence was also sufficient, for a *prima facie* showing with respect to the at-issue positions which this court has found

to be skilled. This is so, it is asserted, because subjective decisionmaking strengthens an inference of discrimination, and requiring a *prima facie* showing of class qualifications when qualifications are unknown would be an insurmountable burden. However, the *Sky Chefs* case did not involve skilled positions. If special skills are required for a job, as here, "the proxy pool must be that of the local labor force possessing the requisite skills." *Moore v. Hughes Helicopters, Inc., supra,* 708 F.2d at 482 & n.5. In addition, the experts agreed that many at-issue jobs in the present case require the rather unique and necessary "qualification" (to be distinguished from a "skill") of preseason availability. Plaintiffs' own evidence establishes that plaintiffs were generaly aware of this important qualification. Finally, for the reasons previously stated, this is not a promotion-from-within case.

Having concluded that plaintiffs' statistics have little probative value with respect to the skilled positions, it must be determined whether the strength of the nepotism evidence, absent defendants' rebuttal evidence, together with plaintiffs' evidence of racial comments and individual instances is sufficient to establish, *prima facie,* a pattern or practice of discriminatory treatment in hiring, promoting, paying, and/or firing. Without the strength of highly probative statistics, plaintiffs' case must largely rise or fall upon the strength of the inference from the evidence of individual instances. The elements are set forth in *McDonnell-Douglas v. Green,* 411 U.S. 792, 802 (1973). To establish individual instances of discriminatory treatment, when statistics are insufficient for a *prima facie* case, generally an individual should show that he belongs to a racial minority, that he applied and was qualified for the position sought, he was rejected, and after the rejection,

the employer continues to seek applications. *Id.* While the *McDonnell Douglas* elements are not an "inflexible formulation", *Teamsters*, 431 at 358, for determining the elements of a *prima facie* case or the inference weight to be assigned the collective individual instances, it nevertheless provides some guidance. Here, it is clear that plaintiffs belong to various racial minorities. At this juncture, however, the only evidence of preseason application, other than oral inquiries, was the February, 1977, written application by Kim Tsuji, a student. She was seeking a summer position. One of the two jobs about which she inquired was generally year around (clerical); the other was unskilled. Ms Tsuji did not disclose any qualifications on her application.

Oral inquiries to a foreman by anyone interested in a job are not treated as applications in the cannery industry. Plaintiffs appeared to have understood this. Gene Viernes, in his deposition at 18, stated in response to a question about Mr. Viernes' oral inquiries,

> [The foreman] gets bored by hundreds of people everyday, I was treated as one such person.

Not only is it asserted that defendants discriminated in individual instances of filling vacancies, but plaintiffs also seek to buttress their *prima facie* case with evidence that various class members were "deterred" from applying for better jobs. Several plaintiffs testified they did not apply for at-issue jobs because they believed defendants discriminated. At the outset, it should be noted that the test for purposeful discrimination is whether a defendant in fact discriminates, and not whether class members subjectively believe a defendant discriminates. *Lewis v.*

Tobacco Wkrs. Intern. Union, 577 F.2d 1135, 1143 (4th Cir. 1978). "Basing recovery on that fact is an improper consideration." *Id.* Nevertheless, under *Teamsters,* 431 at 365,

> The ["whites only"] message can be communicated to potential applicants more subtly but just as clearly by an employer's actual practices -- by his consistent discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, his recruitment techniques, his responses to casual or tentative inquiries, and even by the racial or ethnic composition of that part of his work force from which he has discriminatorily excluded members of minority groups.

Plaintiff's burden at the remedy stage of proving that he would have applied for the job had it not been for an employer's practices is a difficult burden, *Id.* at 368, and at this junctive, the liability stage, the evidence is insufficient to meet that burden. However, plaintiffs' evidence must nevertheless be considered at this point as a factor buttressing the inference of a pattern of discrimination in plaintiffs' *prima facie* case. Accordingly, while significant probative value may not separately be assigned to plaintiffs' statisical evidence, or the testimony regarding individual instances including deterrence, and the evidence of other circumstances including nepotism, nevertheless if the presentation in these various areas is considered collectively, plaintiffs have raised a marginal inference of discriminatory treatment in hiring, promoting, paying, and firing with respect to the skilled jobs. This court is compelled to conclude, however, that defendants have met their burden of production in showing defendants' motivation was not based upon discriminatory animus. Plaintiffs

have not met their ultimate burden of persuasion, and have not established that defendants' conduct was pretextual.

As earlier noted, this court finds defendants labor supply data to be significantly more probative. Under the circumstances of this case, the census data is the most comprehensive source of information correlating race, residence, and occupations in the geographical areas from which defendants draw their employees. Defendants' statistics which do not utilize plaintiffs' theory of counting "re-hires" have greater probative value under the circumstances of this case. Plaintiffs not only count rehires during successive seasons, but at successive canneries within the same season. Thus, an employee who holds the same job for ten years could be counted twenty times. Relying upon *Grant v. Bethlehem Steel Corp.*, 635 F.2d 1007, 1018 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981), plaintiffs maintain that eliminating the rehires narrows the statistical base and allows defendants to perpetuate the results of earlier discrimination. However, in this circuit, as in the Second Circuit (*Bethlehem Steel Corp., supra)*, for the rehire evidence to be probative, it must be established that past discriminatory hiring practices existed. See *Gibson*, 543 F.2d at 1268. Indeed, the facts in *Grant v. Bethelhem Steel Corp.* differed dramatically from those in this case in a number of respects. Of fundamental importance, in *Grant* it was undisputed that the defendant had a long history of race discrimination in hiring. *Id.* at 1017. Second, in
Grant, plaintiffs submitted evidence that persons who were automatically rehired possessed bad safety records which would have excluded them from rehiring in a merit-based hiring system. *Id.* at 1018. Such is not the case here.

Courts have emphasized that statistics must be free from methodologic problems which undermine the reasonableness of any inference to be drawn from such statistics. *Teamsters,* 431 U.S. at 340, n.20.

Finally, under the facts of this case, given the high perishability of the food product and susceptability of the product to lethal disease, together with the shortness of the season, and the many other dangers of the industry, this court would be required, even if it could be said that the circumstances here were similar to those in *Bethlehem Steel,* to find business necessity for such a rehire practice. In addition, the very rehire practice which is statisically challenged, was demanded by plaintiffs' representatives during the collective bargaining process.

Finally, as discussed earlier, defendants' evidence established that regardless of the manner in which a prospective employee came to the attention of the hiring personnel, the person was evaluated according to job related criteria. The testimony showed that numerous white persons who "knew" someone were not hired due to inexperience, and whites hired were paid no more than nonwhites.

The evidence further showed that plaintiffs' oral inquiries were not applications, and the inquiries were generally made of persons without hiring authority. Typically, applications were made too late in the season for the preseason jobs and the applicants were otherwise unavailable due to school schedules or other personal preferences. At this juncture, the court is unable to find a practice of deterrence. The instances of "race labeling", *e.g.,* "Filipino Bunkhouse" were not unique to white

speakers, but this terminology was also routinely used by the nonwhites. While such conduct is hardly to be applauded, under the circumstances, it is not persuasive evidence of discriminatory intent. This court is also unable to find that nonwhites were singled out because of race with respect to rules against fraterization with the women or with respect to "menial" jobs such as grasscutting.

In sum, defendants have met their burden of production, both with statistical and other evidence, and plaintiffs have failed in the burden of persuasion with respect to the skilled at-issue jobs.[2]

HOUSING:

Plaintiffs' evidence of segregated housing showed by a preponderance of evidence facts sufficient to establish a prima facie treatment case. Particularly persuasive was Exhibit 251, a letter dated January 25, 1975 by Hardy Parrish, which correspondence is set out in relevant part in Finding No. 148. Defendants' evidence, however, sufficiently dispels the inference that defendants were motivated by discriminatory animus. At the outset, the court would note that while Parrish is presently a cannery superintendent for CWF at Kenai, at the time he wrote the offensive letter, he was a cannery foreman, and therefore, not responsible for company policy. Nor does

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[2] The 1974 conciliation agreement between the EEOC and CWF, Red Salmon Cannery, and WCP was a negotiated settlement, and not an admission by defendants of liability. The agreement is entitled to little weight. *Domingo v. New England Fish Co.*, 445 F. Supp. 421 n.1 (W.D. WA 1977).

the evidence otherwise support a finding that Parrish was articulating company policy. In addition, defendants established that workers arriving preseason and staying post-season required better insulated housing. Defendants' further evidence showed that workers are housed departmentally because the various departments worked the same shifts. For example, fishermen necessarily come in and out of their bunkhouse during the nights. To arrange the housing nondepartmentally results in more workers awakening and preparing to leave for work while others are trying to sleep. Of course, for the reasons stated earlier, the department of cannery workers is predominantly non-white. Thus, the cannery worker housing was predominantly non-white. Defendants' evidence of housing assignment by time of arrival and by crew sufficiently dispels the inference that defendants were motivated by discriminatory animus, and plaintiffs have failed in their ultimate burden of persuasion and of showing pretext.

Were this court to utilize the impact model rather than a treatment model, the same conclusion would be reached. It is not efficient or economically feasible to open all bunkhouses preseason to assign workers arriving preseason to different housing with a result of maintaining more housing than necessary for longer periods of time. Title VII does not require that a seasonal employer be put to the expense of winterizing summer housing when bunkhouse assignment by date of availability makes such an expense unnecessary. Having found an absence of discriminatory treatment or impact in housing, this court need not reach the question of whether an employer may legitimately "award" or entice with better housing skilled workers who must live on the employment location for a greater length of time than unskilled workers.

MESSING:

Plaintiffs evidence of segregated messing showed by a preponderance of evidence facts sufficient to establish a prima facie treatment case. Defendants' evidence, however, sufficiently dispels the inference that defendants were motivated by discriminatory animus and plaintiffs have not proved pretext. Local 37 members eat in the Local 37 mess. The quality and quantity of food served in the mess halls is the responsibility of the cook in the mess hall. The complaints about the food generally are attributable to matters of personal taste.

Were this court to utilize the impact model rather than a treatment model, the same conclusion would be reached. Defendants operated under the Local 37 contract which provides for a separate culinary crew for the Local 37 crew. Filipino and Asian persons were "overrepresented" in Local 37. Of course, an employer-union agreement which permits an employer to discriminate is not immune to race discrimination claims. *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 926 (9th Cir. 1982). *See, also, General Building Contractors Assoc., Inc. v. Pennsylvania, et al.*, 102 S. Ct. 3141 73 L. Ed.2d 835 (1982). Nevertheless, as stated above, the testimony was that the few whites in Local 37 ate with the Filipinos in the Local 37 mess, and the culinary crew simply acceded to the wishes of the older workers who preferred the traditional food that was served. Consequently, it was the conduct of the union and not the conduct of defendants which caused the pattern of messing along essentially racial lines.

CONCLUSION

Defendants have not discriminated on the basis of race in the allocation of at-issue unskilled jobs. In addition, defendants did not discriminate in the hiring, firing, promoting, or paying in the at-issue skilled positions. Similarly, defendants have not discriminated on the basis of race in housing its employees or in feeding these employees.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

DATED this 31st day of October, 1983.

/s/ Justin L. Quackenbush
JUSTIN L. QUACKENBUSH
United States District Judge

FILED
December 7, 1983

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

FRANK ATONIO, et al.,	)	
	)	
Plaintiff,	)	NO. C-74-145M
	)	
vs.	)	ORDER COR-
	)	RECTING
WARDS COVE PACK-	)	"OPINION FOLLOW-
ING COMPANY, INC.,	)	ING NONJURY
et al.,	)	TRIAL" AND DIR-
	)	ECTING CORRECTION
Defendants.	)	OF "JUDGMENT"
	)	

Defendants request correcting this court's Opinion at Finding 148 (p.47 at 1.17) to list Mr. Parrish's occupation as purchasing agent and to strike the language listing Mr. Parrish's occupation as foreman. The Opinion is corrected by deleting the last two sentences in Finding 148, and by inserting instead, the following language: "At the time of writing this letter, Mr. Parrish was employed at WCP (Red Salmon) but did not have a specific title." While Mr. Parrish is listed as a purchasing agent on Exhibit A-76 at 1551, according to Mr. Parrish's deposition he was assigned various jobs, without the benefit of a particular job title. *See,* generally, Ct. Rec. 242 at 5-8. The

only testimony concerning his job, is found in Mr. Parrish's deposition. This correction does not alter the court's conclusion at page 70 of the Opinion, that Mr. Parrish was not responsible for company policy.

Finding No. 134 of the Opinion at 43 is corrected to delete "1. Pile driver" from the list of unskilled positions. The only testimony with respect to this position shows the job to be skilled. *See* Affidavit of Alex W. Brindle at 36, paragraph 142. The job of "pile driver" is the same as the position "pile buck" which this court found to be skilled. *See* Opinion at 34, Finding No. 131. The court would also agree Finding 134 bears correcting to the extent defendants did not stipulate to the finding that the positions of apprentice carpenter and carpenter's helper were unskilled. Nevertheless, this court will not disturb its finding that these two positions are unskilled.

The following errors are also noted: At page 2, line 2 "1974" is corrected to "1971". At page 70, line 15, "1975" is corrected to "1971".

Plaintiffs' Motion To Correct The Judgment to add the definition of the certified class is also GRANTED. The Clerk of the Court is directed to modify the Judgment by adding the following paragraph pursuant to Judge McGovern's corrected Order Certifying Class at Ct. Rec. 138, p.3:

> The plaintiff class in this case is defined as all non-whites who are now, will be or have been at any time since March 20, 1971 employed by Wards Cove Packing Company, Inc., or Bumble Bee Seafoods Division of Castle & Cooke, Inc., in

either company's Alaska fishing or canning operations, or by Columbia Wards Fisheries at its Alitak, Alaska or Ekuk, Alaska fishing or canning operations.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

DATED this 6th day of December, 1983.

/s/ Justin L. Quackenbush
JUSTIN L. QUACKENBUSH
United States District Judge

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

FRANK ATONIO, et al.,	)	
	)	
Plaintiffs,	)	No. C-74-145-JLQ
	)	
v.	)	SUPPLEMENTAL
	)	OPINION ON
WARDS COVE	)	REMAND
PACKING COMPANY,	)	
INC., et al.,	)	FILED
	)	January 25, 1991
Defendants.	)	
	)	
	)	

On January 25, 1990, the Ninth Circuit Court of Appeals entered the following Order:

> The Supreme Court having reversed the judgment of this court in the above entitled matter, it is hereby ordered that this case is remanded to the district court for further proceedings in conformity with the opinion of the Supreme Court.

Upon receipt of the Ninth Circuit's Order on March 31, 1990, this court directed that briefs be submitted on the issues remanded by the Supreme Court. At the request of counsel for the plaintiffs, oral argument was heard on this matter in Spokane, Washington on July 27, 1990. The court then directed counsel to file supplemental briefs on subjects argued before the court. The final brief

was filed on August 31, 1990, and the matter has been under advisement by the court since that date.

A. HISTORICAL REVIEW

This case was tried by the court in October 1982. Post-trial briefs and argument were thereafter submitted. The court filed its written Opinion Following Nonjury Trial (hereafter Opinion) on November 3, 1983. In 1985, the Ninth Circuit Court of Appeals affirmed this court at 768 F.2d 1120. The Ninth Circuit vacated the original opinion in 1987 and the **en banc** panel then remanded the case to the original panel, at 810 F.2d 1477 (1987). The panel then reversed this court at 827 F.2d 429 (1987.) Thereafter, the Supreme Court granted certiorari, and in 1989, at 490 U.S. ___, 109 S. Ct. 2115, reversed the Ninth Circuit and remanded the case. 490 U.S. ___, 109 S. Ct. 2115. The Ninth Circuit panel then remanded the case to this court "for further proceedings in conformity with the opinion of the Supreme Court."

B. ISSUES ON REMAND

It is clear that this court's disposition in its Opinion of the plaintiffs' claims of disparate treatment has not been disturbed by either the Ninth Circuit or the Supreme Court. Despite the suggestions by the plaintiffs that the court should either expressly or indirectly revisit the disparate treatment claims, the court declines that invitation. The issues remanded by the Supreme Court are limited to the disparate impact claims. 490 U.S. ___, 109 S. Ct. 2120 (n.4). As this court observed during the trial, and as stated by Justice White in footnote 4 of the Supreme Court's opinion, the questions before this court

are not, nor have they been, whether this court "approves" of the defendants' hiring practices or the practices at the canneries but, rather, whether the plaintiffs have established that the defendants' practices violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000 c-e.

This court determines that the appropriate issues that should now be reviewed and analyzed are:

1. Factually, what is the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs?

2. Did the plaintiffs establish a prima facie case of disparate impact on some basis other than the racial disparity between cannery and noncannery workers?

3. Did the plaintiffs establish that nonwhite applicants for the at-issue jobs were deterred from applying for the at-issue jobs by express or implicit practices of the defendants?

4. If a prima facie case of disparate impact has been established, have the plaintiffs established that a challenged practice by the defendants was linked causally with the adverse impact?

5. Have the plaintiffs established that either objective or subjective employment practices such as nepotism, separate hiring channels, rehire preference and subjective decision

making in the selection of noncannery employees had a disparate impact on nonwhites?

6. If the plaintiffs have established a prima facie case of disparate impact, have the defendants produced evidence of a business justification for the employment practice?

7. If the defendants have produced evidence of business justification for a practice causing a disparate impact, have the plaintiffs carried the ultimate burden of proving that discrimination against nonwhites resulted from a specific employment practice?

C. FACT-FINDING AND ANALYSIS OF REMAND ISSUES

1. Racial Composition of Labor Market and At-Issue Jobs.

In this court's Opinion the court ruled against the plaintiffs' claim that the relevant labor pool for the at-issue jobs was the composition of the cannery workers work force. (Opinion, pps. 19-23, 62-63, 67). This court, as well as the Supreme Court, found that such a claim was flawed by the over-representation of nonwhite persons in the cannery force.

This court found that the testimony offered by the defendants as to the relevant labor pool for the at-issue jobs was credible. This testimony was based upon census data for the relevant period. The percentage of whites in

the relevant labor pool for the at-issue jobs is found in Table 4 of Exhibit A-278. This court adopts those figures as the findings of this court as though fully set forth herein **haec verba**. This court further finds that the testimony of Dr. Rees as to the available labor supply for the at-issue jobs was credible and the court accepts that testimony.

This court further finds that the percentage of whites hired by the defendants for the at-issue jobs did not exceed the percentage of whites in the available labor force, except for certain instances, which the court finds were not statistically significant. The four instances relied upon by the plaintiffs, where a statistical disparity existed, were because of nondiscriminatory reasons, such as the preference of the Alaska Native individuals who were qualified for the at-issue jobs, who preferred to fish privately during the operation of the canneries.

The court further finds that the defendants hired individuals for the at-issue jobs based upon their qualifications, and not upon their race. The plaintiffs claim that the qualifications for each at-issue job, as testified to by Mr. DeFrance, were not in existence in writing at the time of the hiring by the defendants. While that is in fact true, the court finds that the qualifications for each job, as testified to by Mr. DeFrance, were qualifications required for the at-issue jobs, and the defendants evaluated applications for each job based upon the requirements of the job(s) and the qualifications of each applicant.

The plaintiffs' strongest argument was based upon the admitted fact that the available race-identified applicant flow statistics for the period of 1978-1980 showed that nonwhite applicants totaled 26 percent of the applicants

who set forth their race. This court, however, does not give substantial weight to this evidence for several reasons. First, of the 1,966 applicants considered, only 539 contained race identifications, of which 138, or 7 percent of the total applications, were nonwhite. Secondly, the census-based labor market statistics and testimony offered by the defendants were more credible as to the relevant labor market available for the at-issue jobs. As previously found by this court, the evidence established that the at-issue jobs were not held by a significantly higher percentage of whites than those existing in the relevant available labor market.

This court has been troubled by the claims of the plaintiffs that the defendants destroyed applications for at-issue positions for the relevant periods prior to 1980. The evidence substantiates that, for some of the canneries, the defendants did destroy applications. The court notes that one of the attorneys for the defendants even forwarded on July 5, 1978, a memo to the superintendents of the canneries and to the officers of the defendants concerning the destruction of the applications. (See Memorandum of attorney Jeremiah M. Long, dated July 5, 1978, attached as Exhibit G to plaintiffs' Citations To Transcript Re: Destruction of Personnel Records). The court finds that even after this memo, some of the canneries destroyed the seasonal applications. While not free from doubt, this court finds that any destruction of records took place in the usual course of business, in accordance with the long-standing practice that such applications are destroyed annually. There is no evidence that the officers of the defendants directed the destruction of the applications in an effort to withhold damaging evidence. In fact, the record does establish that the applicant records were

retained for the majority of the canneries after 1978.

Finally, the plaintiffs contend that the court should infer that the applicant racial data would be adverse to the defendants by reason of 29 C.F.R. §1607.4A, the Uniform Guidelines on Employee Procedures. The court agrees with the defendants that these Guidelines are not mandatory with regard to the at-issue jobs in this case, particularly since the jobs are seasonal. *See* 29 C.F.R. §1602.14(b).

Based upon the prior Opinion of this court and the additional Findings herein set forth, this court concludes that the nonwhite racial composition of the relevant available labor market did not exceed the actual nonwhite composition of the defendants' at-issue labor force.

2. Was A Prima Facie Case Established By The Plaintiffs On A Nonstatistical Basis?

The defendants argue that since the plaintiffs did not statistically establish that there was a disparate impact in the at-issue job hiring by the defendants, the plaintiffs have failed to show any causal connection between any employment practices and a resultant disparate impact on the plaintiffs. While the fact that there is not a statistical imbalance in the at-issue jobs carries substantial weight, an employer may not escape liability under Title VII by demonstrating that, at the "bottom line", its work force is racially balanced where particular hiring practices operate to deprive minorities of employment opportunities. *Connecticut v. Teal,* 457 U.S. at 450; and *Wards Cove,* 490 U.S. ___, 109 S. Ct. at 2124. The burden is upon the plaintiffs to show that the defendants' application of a

specific employment practice created a disparate impact on nonwhites' employment opportunities. *Wards Cove,* 109 S. Ct. at 2124.

The alleged specific employment practices challenged by the plaintiffs include nepotism, separate hiring channels, rehire preferences, and subjective decision-making.

a. Nepotism

In its original Opinion, at p. 64, this court referred to "nepotism" evidence and to a "high incidence of nepotism." This court's use of the term "nepotism" was not meant to be construed to include a finding that the defendants gave preference to relatives of other employees. This term was used only in its general sense, that being that the plaintiffs introduced evidence that a substantial number of the employees of the defendants were related. This court did not find in its original Opinion, and does not now find, that the defendants favored applicants by reason of their being related to other employees. The evidence is to the contrary. While the evidence did establish that some employees were related in some manner to other employees, the evidence did not establish that such employees were hired based upon their relationship to other officers or employees. This court concludes that the employees hired for at-issue jobs were hired based upon their qualifications and not by reason of being related to another employee.

The plaintiffs introduced Exhibits 608 through 612 to support their claim of hiring based upon relationship. These exhibits and the statistics contained therein were

flawed in that they inflated the number of employees who were related. These statistics submitted by the plaintiffs, **inter alia**, counted related employees who were rehired each year as separate and new hires for each year, and by counting both related parties as new hires. The plaintiffs' evidence did not distinguish between employees who became related after being hired and those who were related at the time they were hired. Besides the lack of appropriate statistical methodology in the plaintiffs' evidence, the evidence established that related applicants were not hired when they did not have the necessary qualifications. This court therefore finds that the plaintiffs' evidence did not establish a disparate impact upon the plaintiffs by reason of alleged nepotistic hiring practices.

b. Separate Hiring Channels

The plaintiffs' evidence failed to establish that the defendants recruited employees for the at-issue positions through separate hiring channels. Plaintiffs' real challenge in this regard is that there was one hiring channel, Local 37, for the cannery worker positions, and another hiring channel for the at-issue positions.

The evidence in this case failed to establish that the defendants had separate hiring channels for the positions at the canneries. As previously found, since Local 37 had members who were predominately nonwhite, members of that union who filled cannery worker positions were largely nonwhite. However, as the court has previously found in its Opinion, cannery workers were not precluded from applying for at-issue jobs; and, as also previously found by this court, some individuals who had worked as cannery workers were thereafter hired in at-issue jobs.

The defendants did not have a separate hiring channel for the at-issue jobs, but hired persons from the general labor pool if the applicants had the necessary qualifications. The defendants' practices in hiring for the at-issue positions did not disparately impact nonwhites.

c. Rehire Preferences

This court has found that the plaintiffs failed to establish initial hiring practices which disparately affected nonwhite applicants. From this finding, it follows that the defendants' appropriate business practice of rehiring experienced persons in the at-issue positions could not result in a disparate impact finding in this case.

d. Subjective Decision Making

Plaintiffs contend that the defendants, having no written specifications for each at-issue job, relied solely on subjective decision-making. This court has previously found, and again finds, that the defendants hired for the at-issue jobs based upon the qualifications of the applicants and the availability of a position. The plaintiffs failed to establish that any subjective decision-making process resulted in a disparate impact upon the decision as to the hiring of nonwhite applicants. The census statistics, which this court has found applicable as to the relevant available work force, and the statistics of the at-issue work force, confirm the lack of adverse subjective decision-making.

3. Did The Plaintiffs Establish That Nonwhite Applicants For the At-Issue Jobs Were Deterred From Applying For The At-Issue Jobs By Express Or Implicit Practices Of The Defendants?

This court has previously found, and again finds, that cannery workers, along with the general population having the necessary qualifications for at-issue positions, were free to apply for such jobs. Any feeling that an individual cannery worker or nonwhite may have had to the contrary was not the result of any express or implicit practice of the defendant.

4. If A Prima Facie Case of Disparate Impact Has Been Established, Have the Plaintiffs Established That A Challenged Practice By The Defendants Was Linked Causally With The Adverse Impact?

For the reasons stated hereinabove in this Supplemental Opinion and in this court's original Opinion, the court answers this question in the negative.

5. Have The Plaintiffs Established That Either Objective Or Subjective Employment Practices Such As Nepotism, Separate Hiring Channels, Rehire Preference and Subjective Decision Making In The Selection Of Noncannery Employees Had a Disparate Impact On Nonwhites?

For the reasons stated in this court's original Opinion and for the reasons stated, *supra*, the court answers this question in the negative.

6. If The Plaintiffs Have Established a Prima Facie Case

of Disparate Impact, Have the Defendants Produced Evidence of a Business Justification For The Employment Practice?

The plaintiffs have not established a prima facie case of disparate impact; therefore, the business justification issue is not before the court. However, the business justification of the defendants for their housing and messing practices were discussed in this court's Opinion at pps. 69-73 and will again be discussed, *infra.*

7. If The Defendants Have Produced Evidence of Business Justification For A Practice Causing A Disparate Impact, Have The Plaintiffs Carried the Ultimate Burden of Proving That Discrimination Against Nonwhites Has Been Caused By A Specific Employment Practice?

By reason of this court's prior rulings, business justification is not a remaining issue in this case, but will be discussed in the housing and messing section.

D. HOUSING AND MESSING

Because of the peculiar circumstances of this case and what at first blush might appear to be a clear case of housing and messing along racial lines, this court will address the issues separately, even though it was previously discussed and decided on both a disparate treatment and disparate impact basis in this court's prior Opinion. (See pps. 47 and 48; 70-73.) This court is also mindful of the rule set forth in footnote 9 of *Wards Cove,* at 109 S. Ct. 2124, that allegations of segregation in housing and eating facilities in the work place may be challenged under Title VII without showing a disparate impact on hiring or

promotion.

This court is not insensitive to the claim of segregated housing or messing. In this case, the evidence did not establish that the employees were segregated at the various canneries based upon their race but, rather, were housed and fed based upon their time of arrival, the nature of their employment, and the shift being worked. In fact, all housing and messing at the defendants' canneries was occupied and used by both whites and nonwhites. In some of the housing, such as that occupied by the cannery crews which had a majority of nonwhites, whites were in the minority. In other housing, being that occupied by the skilled workers where the majority were white, nonwhite skilled workers were in the minority. The same rule applied to the food service or messing areas which in most instances were proximately located to the housing. The cannery workers' mess usually served oriental-style food, since that was the preference of the cook selected by those workers. Cannery workers, regardless of race, were permitted to change their messing assignment to the mess used by the skilled workers, or vice versa.

As stated in this court's original Opinion, the nature of the work and the shortness of the season at the remote Alaskan canneries played a vital role in this court's analysis and decision on the housing and messing claims. The actual canning season each summer is a short one, usually lasting only a period of a few weeks. The skilled cannery workers occupying the at-issue jobs are required to arrive in advance of the cannery workers in order to repair the damage from the preceding winter and prepare the canneries for the arrival of cannery workers and the operation of the facility during the salmon harvest. The

skilled advance workers are housed together regardless of race and remain so housed throughout the salmon season. These workers, who arrive earlier in the colder season and stay later than the cannery workers, are properly housed in the more insulated buildings.

Based upon this court's prior Opinion and the additional findings made herein, the court concludes that the plaintiffs have failed to establish a prima facie cased of disparate impact in the provision of housing and messing for the plaintiffs. Even if the court had found a prima facie case had been established by the plaintiffs, the defendants have produced credible evidence of proper business justification for the housing and messing practices. This court has previously made findings herein and in its prior Opinion concerning the business justification for the practices. The plaintiffs have failed to show that the defendants' stated business justification reasons are pretextual and the plaintiffs have failed to establish disparate impact in the housing and messing practices of the defendants.

E. CONCLUSION

This court concludes that, based upon the standards established in the Supreme Court's decision in *Wards Cove*, the plaintiffs have failed to establish disparate impact in any of the defendants' hiring practices for the at-issue jobs, and have also failed to establish that the defendants' housing and messing practices have a disparate impact on the class plaintiffs. This court has also reviewed its prior Opinion in this matter entered in 1983, and has found no reason or basis for altering any of its Findings of Fact or Conclusions of Law set forth therein.

For the reasons set forth in this Supplemental Opinion, and for the reasons previously set forth in this court's prior Opinion Following Nonjury trial signed by this court on October 31, 1983, the **Clerk of this court shall enter judgment dismissing the complaint of the plaintiffs and the claims therein with prejudice with the defendants being awarded their costs and disbursements herein incurred.**

IT IS SO ORDERED. The Clerk is hereby directed to enter this Order and Judgment and furnish copies to counsel.

DATED this 23rd day of January 1991.

/s/ Justin L. Quackenbush
JUSTIN L. QUACKENBUSH
UNITED STATES DISTRICT JUDGE

__Filed
__Lodged MAIL
__Received

MAR 20, 1991

At Seattle
Clerk U.S. District Court
Western District of Washington
By Deputy

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

FRANK ATONIO, et al *Plaintiffs,* vs. WARDS COVE PACKING COMPANY INC., et al., *Defendants.*	NO. CS-74-145-JLQ ORDER AMENDING SUPPLEMENTAL OPINION ON REMAND

On January 23, 1991, this court entered its Supplemental Opinion on Remand in the above-entitled matter. The court has now discerned that there are three typographical errors in the written Opinion. Therefore, this Order is intended to Amend the Opinion to make the following corrections:

1. Page 2, line 2 should read that ("This case was tried by the court in May of 1982").

2. Page 2, line 7 should add immediately following the 768 F.2d 1120 citation that ("The Ninth Circuit panel opinion affirming this court's opinion was withdrawn and presented for **en banc** review at 787 F.2d 462 (9th Cir. 1985)").

3. Page 2, lines 9-10 should read that (The panel then reversed this court at 827 F.2d 439 (1987)").

The Supplemental Opinion on Remand **IS SO AMENDED.**

IT IS SO ORDERED. The Clerk is hereby directed to enter this Order and furnish copies to counsel.

DATED this 16th day of March 1991.

/s/
JUSTIN L. QUACKENBUSH
Chief United States District Judge

UNITED STATES DISTRICT COURT for the
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FRANK ATONIO, et al.,	)	
	)	
vs.	)	Civil Action
	)	Docket No. C74-145JLQ
WARDS COVE	)	
PACKING COMPANY	)	JUDGMENT
INC., et al.,	)	
	)	
_____	)	

This action came on for hearing before the court, United States District Judge Honorable Justin L. Quackenbush presiding. The issues having been duly heard and a decision having been duly rendered, **it is ordered and adjudged**

that the complaint of the plaintiffs and the claims therein are dismissed with prejudice with the defendants being awarded their costs and disbursements herein incurred.

__FILED __ENTERED

__LODGED __RECEIVED

JAN 29 1991
AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

Dated at: Seattle, Washington Date: January 29, 1991

/s/
Deputy Clerk of the Court

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK ATONIO; ALAN LEW; CURTIS LEW; EUGENE BACLIQ; JOAQUIN ARRUIZA; RANDY DEL FIERRO; BARBARA VIERNES; CLARKE KIDO; LESTER KURAMOTO; MARGARET BACLIG,	)	FILED JAN 31, 1994 Cathy A. Catterson, Clerk U.S. Court of Appeals
Plaintiffs-Appellants,	)	CA No. 91-35306/35861 DC No. CV-74-00145 JLQ
v.	)	ORDER
WARDS COVE PACKING COMPANY, INC., a foreign corporation; BUMBLE BEE SEAFOODS, INC., a domestic corporation; COLUMBIA WARDS FISHERIES,	)	
Defendants-Appellees,	)	
and	)	
UNITED STATES OF AMERICA,	)	

Intervenor.)
)
_____)

BEFORE; WRIGHT, FLETCHER AND CANBY, CIRCUIT JUDGES.

The petition for rehearing is denied.

No. 93-1767

Supreme Court, U.S.
FILED
MAY 19 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

FRANK ATONIO, ALAN LEW, CURTIS LEW, JOAQUIN ARRUIZA, RANDY DEL FIERRO, CLARK KIDO, LESTER KURAMOTO, BARBARA VIERNES, as administratrix of the Estate of Gene Allen Viernes, MARGARET BACLIG, as administratrix of the Estate of Eugene Baclig, and all others similarly situated,

Petitioners,

v.

WARDS COVE PACKING COMPANY, INC., DOLE FOODS, INC., f/k/a CASTLE & COOKE, INC., COLUMBIA WARDS FISHERIES and UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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I. COUNTER-STATEMENT OF THE CASE

Respondents oppose the grant of *certiorari*. Question One as presented by the petition is not ripe for review. Question Two is unique to this case and does not present a question of national importance.

A. Material Facts.

The factual background for this case is set forth in this Court's prior decision in this case, *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 646-648 (1989). The factual circumstances giving rise to this case are unusual, if not unique.

Respondents operate salmon canneries in remote and widely separated areas of Alaska. The canneries operate only during the summer salmon run. For the remainder of the year they are vacant. Respondents' head office and support facilities during the case period were located in Seattle, Washington and Astoria, Oregon.

The canneries' employment requirements vary with the size and duration of the salmon runs. Respondents hire employees primarily from the Pacific Northwest and Alaska. The bulk of the employees are "cannery workers," who work in the cannery on the fish processing and canning lines. Local 37 of the I.L.W.U. has jurisdiction over and a contract for these jobs. The remaining jobs at the cannery are carpenters, machinists, tender crews, longshoremen, administrative, and other support personnel. It is these non-cannery worker jobs which are at issue. The non-cannery worker jobs are covered by several union contracts. Some are non-union. The trial

court's initial opinion sets forth the facts in detail. *See* Pet. App. A-147-196.

Respondents hire all employees except those persons working on the cannery line (cannery workers) from an external labor market that is 10% non-white. For the positions at issue, respondents hired 21% non-whites in the at-issue jobs at their class canneries. Cannery workers, on the other hand, were hired through Local 37 of the I.L.W.U. The composition of Local 37 is dominated by Filipinos, as are the crews it dispatches to the canneries each summer. In addition, respondents filled some cannery worker jobs for some canneries from local populations.

B. The Relevant Labor Market.

This case is factually controlled by the labor market evidence. Petitioners in their statement of the case refer to evidence they presented at trial of industry-wide percentages of non-white workers, with only passing reference to the labor market statistics that the trial court found more accurate. *See* Pet. at p. 5-6. This presents an inaccurate view of the factual context in which this case will be presented if the petition is granted.

In its initial decision, the trial court found respondents' labor market data based on the census to be more credible than petitioners' data, which showed only that there existed a higher percentage of minorities in the cannery worker jobs than in the at-issue jobs. The court also accepted as accurate the industry-wide statistics that petitioners now cite, but found them not to be an accurate measure of the labor pool because they were distorted by

the over-representation of non-whites in the cannery work force. Pet. App. A-168-169. The court thus found as a fact that the labor pool for the at-issue jobs was approximately 10% non-white.

On appeal, the Ninth Circuit, although initially affirming, 768 F.2d 1120 (1985), granted a rehearing *en banc*, 787 F.2d 462 (1985), and, *inter alia*, remanded to the original panel, 810 F.2d 477 (1987). That panel then held that petitioners' "comparative" statistics were adequate to establish a prima facie case of disparate impact, and remanded for an examination of the business necessity of respondents' hiring practices. 827 F.2d 429 (1987).

This Court reversed and remanded that decision, holding that the comparative statistics as a matter of law could not establish disparate impact, that plaintiffs bringing claims of disparate impact against their employers' practices under Title VII of the Civil Rights Act of 1964 had to prove the impact of each practice that they attacked, and that the burden of persuasion remained at all times on plaintiffs. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

On remand, the trial court reexamined the labor market evidence, and again found the evidence based on the census data to be more credible. Pet. App. A-221-222. The court again entered judgment for respondents. On appeal, the Ninth Circuit affirmed the trial court's findings on the labor market, holding that the industry-wide statistics that petitioners now cite were inadequate as a matter of law under this Court's decision in *Wards Cove, supra, see* Pet. App. A-24-25, and that the district court's reliance on the evidence derived from the census data

was not clearly erroneous. *See* Pet. App. A-23. Thus in the factual context of this case respondents' hiring practices must be measured against a labor pool that overall is only 10% non-white.

Petitioners refer to respondents' expert's testimony that bottom line disparity existed in four of 138 at-issue job classifications. Pet. at 8-9. Such disparities could have existed on the basis of chance alone, and the trial court found that adequate non-discriminatory reasons were offered to explain such disparities. Pet. App. A-222. The Ninth Circuit held such evidence to be only minimal evidence of impact and that there was no causal connection shown between such disparities and any of the employer practices. Pet. App. A-26, 28. These bottom line disparities in the context of this case are without legal significance.

Petitioners' statement that respondents destroyed job applications while the case was pending involves an evidentiary matter that is irrelevant to whether the petition should be granted. The trial court considered the evidence, but refused to draw an inference from it. Pet. App. A-223-224.[1]

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[1] The ruling was within the court's discretion. The Court of Appeals affirmed the holding that the applicant flow data was less credible than respondents' labor market statistics. The applications contained no data that was job specific. *See* Pet. App. A-25-26.

C. The Court of Appeals Decision.

The Civil Rights Act of 1991, 105 Stat. 1071, ("the Act") was passed while this case was pending in the Ninth Circuit following petitioners' appeal of the trial court's decision on remand. Sections 104 and 105 of the Act were intended to change the method of analysis set down in the *Wards Cove* case insofar as it related to the burden of proof on issues of job relatedness and business necessity. The Act also relieves employees of the need to prove that specific practices caused disparity if the employees can prove instead that the elements of the employer's decisionmaking process make them incapable of separate analysis. The Act does not otherwise relieve employees of the burden to prove impact and causation. Section 402(b) of the Act, which is the subject of petitioners' challenge, dictates that no provisions of the Act are to be applied to a narrow class of cases. Respondents do not dispute that § 402(b) was passed with this case in mind, and that this case is apparently the only case to which it would apply.

The Court of Appeals did not separately analyze the retroactivity of Sections 104 and 105 of the Act. Instead, it followed its own earlier decision in *Estate of Reynolds v. Martin*, 985 F.2d 470, *reh'g en banc denied*, 994 F.2d 690 (9th Cir. 1993), *overruled, Landgraf v. USI Film Products*, No. 92-757, ___ U.S. ___ (1994), which held that the statutory language of the Act expressed a clear congressional intent that the entire act be applied retroactively. Pet. App. A-10. Having concluded that §§ 104 and 105 were thus retroactive, the court was forced to confront three challenges to the constitutionality of § 402(b) of the Act. The court held that § 402(b) did not present any separation of powers issues because it does not dictate the result. Pet.

App. at A-12-13. The court further held that § 402(b) did not violate Fifth Amendment due process because it did not classify by race, and that it was rationally related to a legitimate governmental interest. Pet. App. at A-13-15. Proceeding to the merits, the court affirmed the trial court's findings on the labor market, but the court also held that its earlier decision at 827 F.2d 439 (1987) (Atonio II), holding that separate hiring channels, race labelling and segregated housing were established, was unaffected by this Court's intervening decision reversing and remanding Atonio II. The court reasoned that this Court's decision was limited to Atonio II's holding on the petitioners' comparative labor market statistics. Pet. App. A-33 n.14.

Based on its reading of *Wards Cove*, the court remanded with instructions that the trial court must now determine whether the fact of separate hiring channels deterred the individual claimants from applying for at-issue jobs, whether one particular alternative to respondents' housing practices was feasible, and whether such labelling created any disparate impact. Respondents do not concede that these rulings were correct, but they are not before this Court on the present petition.

II. SUMMARY OF THE ARGUMENT

The effect of § 402(b) of the Civil Rights Act of 1991 is to make new legislation neutral to the outcome of this case. It therefore presents no separation of powers issues. The section also does not interfere with fundamental

rights, nor does it proceed along suspect lines. It therefore does not raise any Fifth Amendment equal protection concerns.

This Court need not decide the retroactivity of §§ 104 and 105 of the Civil Rights Act of 1991 at this time. That issue is not yet ripe for decision in this particular case.

III. ARGUMENT

A. This Case Does Not Present Any Substantial Constitutional Questions.

1. The Constitutionality of § 402(b) of the Civil Rights Act of 1991 is not of National Importance.

Whether § 402(b) of the Act is unconstitutional is of limited national importance. The parties agree that it applies only to this case. It is a comparatively minor and narrow provision of a long and complex statute. *See Landgraf v. USI Film Products*, No. 92-757, ___ U.S. ___, Slip Op. at 13 (1994). The circumstances which gave rise to its passage are sufficiently rare that they are not likely to recur in any significant numbers.

Sections 104 and 105 of the Act were specifically intended to overrule an earlier decision in this case, where this Court set down the principles for analyzing the facts of this case in deciding petitioners' disparate impact claims of discrimination. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). The Court remanded for further proceedings. In the face of these results, petitioners,

with the assistance of Senator Brock Adams, whose former law firm had been their trial counsel, assiduously lobbied Congress to change the result in this case, asserting as fact allegations they had been unable to sustain in court. *See* Cong. Rec. Oct. 30, 1991 S15469 (letter from Frank Atonio).[2] The Act is expressly intended to modify the *Wards Cove* decision, *see* 105 Stat. 1071 §§ 2(2), 3(2) and 3(4), and Sections 104 and 105 in fact do modify it in part. Congress also recognized, however, that this case was still pending, and decided as part of a compromise to insure passage of the bill that the new standards of proof under the Act should not be injected into this case. The likelihood that such unusual circumstances will arise in the future is slight, and argues against this Court devoting its time and energy to the issues of this case.

Moreover, concerns of fairness do not add to the importance of this case. This case was tried in 1982, the evidence was twice examined by the trial court, and the trial court twice concluded that respondents did not discriminate, but rather that they hired more minorities than the labor market would predict. For Congress to have decided to refuse to let petitioners have yet one more bite at the apple under newly prescribed standards is not unfair.

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[2] It was in the face of this effort that respondents lobbied for insertion of § 402(b), to assure that the case would not have to be reexamined under new standards if Congress saw fit to change the law.

2. No Significant Separation of Powers Interests Are Presented by This Case.

Section 402(b) does not present any significant issue concerning the separation of powers under Article III. This section is a comparatively minor and narrow part of a long and complex statute, *see Landgraf, supra*, Slip Op. at 13, that was intended to change and to expand the civil rights laws, without any express declaration as to whether the individual sections should be applied prospectively or retroactively. Although § 402(b) was undoubtedly passed with this case in mind, it does not require the courts to reach any particular result under the Act, or under the law as it existed before Congress passed the Act. To the contrary, its purpose is just the opposite. In the face of a statute which generally requires that the courts decide how to apply the new law to pending cases, § 402(b) merely declares that the new statute is not to apply to a narrow class of cases. The courts were free to find facts and to apply law to those facts, without regard to the result.

United States v. Klein, 80 U.S. (13 Wall.) 128 (1871), cited by petitioners, is readily distinguishable. Congress there had enacted a statute that "den[ied] to pardons granted by the President the effect which this Court had adjudged them to have." 80 U.S. (13 Wall.) at 145. The act thus violated the doctrine of separation of powers in two respects. First, it required the Supreme Court to dismiss cases for want of jurisdiction in any case where the fact of the pardon existed, thus dictating the result of those cases in favor of the government, and interfering with the judicial function of this Court. Second, by denying effect

to the pardon, it circumvented the President's plenary constitutional power to grant pardons. Section 402(b) has no effect on the executive department, and does not require the judiciary to decide the instant case in favor of either party. It simply requires that cases that come within its scope be decided without reference to changes in the law enacted in 1991.

The two other cases that petitioners cite are inapposite. In those cases, this Court found Congress had not raised any Art. III § 3 concerns. In *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980), Congress enacted a law that allowed the Sioux Nation to assert a claim against the United States, for the taking of the Black Hills from the Great Sioux Reservation, that had already once been finally adjudicated, and required it to be decided on the merits, without reference to the defenses of res judicata or collateral estoppel. This Court held that statute merely to be a waiver of a defense and within the Congress's power to pay the nation's debts under Art. I § 8 cl. 1. This Court found the statute to be consistent with *Klein*, and not a violation of Art. III § 3.

In *Robertson v. Seattle Audubon Society*, ___ U.S. ___, 112 S. Ct. 1407, 118 L. Ed. 2d 73 (1992), also cited by petitioners, plaintiffs in two cases had challenged timber cutting in areas inhabited by spotted owls, alleging that the harvests violated several state statutes. As part of the Northwest Timber Compromise, Congress enacted a statute that temporarily amended the environmental statutes to eliminate the statutory support for plaintiff's claims, which were then pending in the district courts. This Court held that the statute, even though it specifically referred to the two pending cases, did not raise Article III

concerns because it was a permissible change in the law and not a legislative direction that the courts reach a particular result in the pending cases.

The import of § 402(b) is quite different than any of the cases where this Court has addressed Article III separation of powers concerns. It does not change the law or the facts applicable to this case. Quite the opposite, it mandates that the changes in the law enacted in the Civil Rights Act of 1991, some of which were specifically intended to overrule a prior decision in this very case, not be applied to this case. As the Ninth Circuit correctly observed, § 402(b) leaves the courts free to determine the outcome of this litigation with all the latitude they would have had if the 1991 Act had not been passed.

3. Section 402(b) Does Not Raise Any Issue of Denial of Equal Protection.

For a statute to raise issues of equal protection it must interfere with fundamental rights or proceed along suspect lines. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 *(per curiam)* (1976). Section 402(b) does neither.

Petitioners here filed their case in 1974 and tried it in 1982. The case has been reviewed once by this Court and several times by the Court of Appeals for the Ninth Circuit and the trial court reexamined the evidence on remand in 1991. The provision of the 1991 Act that petitioners challenge would merely prevent them from relitigating the case under the new standard of the 1991 Act.

Petitioners rely heavily on the fact that Congress perceived this Court's decision in this case to be wrong. That fact is irrelevant. This Court has recognized that Congress is allowed wide latitude in correcting problems it perceives to exist, and may do so in measured steps. *See Katzenbach v. Morgan*, 384 U.S. 641 (1966). And in *Rivers v. Roadway Express, Inc.*, No. 92-938, ___ U.S. ___ (1994), this Court held that even when Congress expressly intends a statute to supersede a rule of law laid down in an earlier decision of this Court, it will not be given retroactive effect unless Congress also expresses in the statute a clear intent that it be so applied. Petitioners have no fundamental right to take advantage of changes in the law enacted long after their case was first heard on the merits.

In addition, § 402(b) is not, as petitioners argue, "conspicuously racial in scope." Pet. at 25. It is not racial at all. As the Ninth Circuit correctly recognized in the decision below, § 402(b) does not target any racial class or other category subject to special constitutional protection, but rather a particular class of cases pending at the time the Act was passed. Indeed, except as it pertains to this specific litigation, both petitioners and respondents are subject to the terms of the Act.

Petitioners also misstate the basis on which governmental interest must be weighed when applying equal protection principles to an act of Congress. The Court must look not just to the effect of § 402(b), but to whether any of the governmental interests of this long and complex statute are furthered by its inclusion. Moreover, even when the selectivity of the statute would violate equal protection concerns of the Fourteenth Amendment Equal Protection Clause if passed by a State, if the statute serves

any overriding national interest it will not violate the equal protection concerns of the Fifth Amendment guarantee of due process. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976). Congress here perceived the Act as strengthening and improving the federal civil rights laws. This serves such an overriding national interest. § 402(b) was included in the Act as part of a compromise between leaders of the civil rights community and the Bush Administration to insure passage of the Act. *See* 137 Cong. Rec. S15966 (daily ed. November 5, 1991); *see also* 137 Cong. Rec. S15953, S15967-8 (daily ed. November 5, 1991).

Petitioners are also incorrect in stating that the purpose of § 402(b) is to afford respondents an edge in this litigation. Respondents have no more or no less of an advantage after passage of the Act than they did before. The effect of § 402(b) is thus to make the new legislation neutral to the outcome of this case.[3]

B. This Case is Not the Proper Vehicle for Deciding Whether §§ 104 and 105 of the Act are Retroactive.

1. If § 402(b) of the Act is Constitutional, Question One is Moot as to These Parties.

Section 402(b) of the Act provides that regardless of whether particular sections are retroactive, no part of the

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[3] The same would not be true, however, if § 402(b) had expressly declared that the terms of the Act *were* to be applied to this case. In that eventuality, the petitioners might be afforded an edge by requiring that the evidence presented at trial be re-examined under different standard of proof than existed at the time the evidence was presented.

Act is to be applied to certain cases, of which this case is apparently the only one.[4] If that section is valid, then §§ 104 and 105 of the Act cannot be applied to the facts of this case. Thus if the Court were to grant *certiorari*, the focus of the parties will necessarily be on the constitutional issue, which is potentially dispositive of the case. A decision upholding the effect of § 402(b) will render meaningless to these parties any decision on the retroactivity of §§ 104 and 105 of the Act.

2. Applying Sections 104 and 105 of the Act to This Case Will Not Significantly Change the Result.

Petitioners argue that applying §§ 104 and 105 of the Act to this case would allow them to utilize their discredited industry-wide statistics to prove "bottom line disparity" under § 105(a)(k)(1)(B)(i).[5] The Act does not so provide.

Respondents do not concede that the challenged practices cannot be separated for analysis. Even if this were so, however, the industry-wide statistics were

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[4] Petitioners contended in the Court of Appeals that § 402(b) did not apply to this case, *see* Pet. at 17 n.4, but in the face of unambiguous legislative history on this issue, the court correctly held otherwise. App. A-9 at n.3.

[5] " . . . [T]he complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, *except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice* (emphasis added)."

rejected because they did not adequately reflect the labor pool for the jobs at issue. Pet. App. A-24. *See* Pet. App. A-168. This finding of fact will not be changed by applying the Act. The statistical evidence credited by the trial court showed no significant disparity at the bottom line.

3. The Lower Court in This Case Did Not Decide the Issue Presented by Question One.

In light of this Court's recent decisions in *Landgraf, supra,* and in *Rivers, supra,* Question One of the petition must be read to ask this Court to decide whether, in the absence of a clearly expressed congressional intent on their retroactivity, §§ 104 and 105 of the Act are "procedural," and whether they should be applied to pending cases. These issues were not addressed in the opinion of the court below, and are not ripe for review by this Court.

In ruling on the retroactivity question below, the Ninth Circuit held that Congress clearly expressed its intent in the language of the Act that the entirety of the Act was retroactive, relying on its earlier decision in *Estate of Reynolds v. Martin,* 985 F.2d 470, *reh'g en banc denied,* 994 F.2d 690 (1993). Pet. App. at A-10. In *Reynolds,* the Ninth Circuit held that the Act was unambiguous on its face in expressing congressional intent that it be applied retroactively. The court held that the qualifying language in § 402(a) of the Act[6] was superfluous unless

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[6] "Except as otherwise specifically provided, this act and the amendments made by this act shall take effect upon enactment."

referring to sections 402(b) and 109(c), and that the language of the Act therefore clearly evidenced congressional intent that it be retroactive. This analysis was expressly rejected in this Court's decision in *Landgraf*.

Because the court of appeals concluded that the intent of Congress was clear on its face, it did not need to apply any default rule of retroactivity and therefore did not decide whether the provisions of §§ 104 and 105 "attached new legal consequences to events completed before its enactment." *Landgraf, supra*, Slip Op. at 25. It would not be a prudent use of this Court's discretion to decide an issue that the court below did not. S. Ct. Rule 10.1(c).

4. This Court Should Not Engage in a Section by Section Analysis of the Act.

In light of this Court's recent decisions in *Landgraf* and *Rivers*, retroactivity of §§ 104 and 105 of the Act is not an issue appropriate for this Court to decide at this time. In *Landgraf*, this Court held that the language of the Act did not clearly evidence an intent on retroactivity, and that the sections of the Act must be analyzed individually. The Court then set forth a rule of analysis for deciding when the courts must apply a statute retroactively. The Court provided further aids to the analysis in the companion *Rivers* decision. This Court need not apply that analysis to each section of the Act, but should leave to the lower courts the task of applying the analysis to specific factual contexts.

5. This Court Did Not Adopt a Procedural-Substantive Bright Line Test for Retroactivity.

The petition asks this Court to decide the retroactivity of §§ 104 and 105 of the Act based on whether they "are procedural in nature." Such analysis is not in accord with the decisions of this Court and is not supported by the cases that petitioners cite. Moreover, the practical effect of those sections - shifting the burden of proof on the issue of business necessity after a trial in a disparate impact case - is plainly substantive.

In *Landgraf* this Court held that when Congress does not expressly command whether a statute is to be applied retroactively or prospectively it must be applied prospectively if it has retroactive effect. Whether it is procedural in nature is not determinative. *See id.*, Slip Op. at 31 *and* n.29. Further, this Court affirmed the holding of the Fifth Circuit: "[W]e do not invalidate procedures followed before [a] new rule was adopted. 968 F.2d, at 432-433." *Id.*, Slip Op. at 3.

Petitioners argue that §§ 104 and 105 create no substantive rights or liabilities, but simply enumerate defenses. The cases they cite do not support that proposition. In *French v. Grove Manufacturing Co.*, 656 F.2d 295 (8th Cir. 1981), which petitioners mistakenly attribute to the Ninth Circuit, the Arkansas legislature had amended their Products Liability Act by adding definitions and enumerating defenses and indemnification remedies. The amendment took place two years after the accident that gave rise to the lawsuit. The Eighth Circuit, applying Arkansas law, held that the statute did not create any

new causes of action or substantive rights or liabilities, and therefore held that it should apply to the pending case. Significantly, the court recognized that the amendment did not change the law to be applied to the case. 656 F.2d at 298 n.2.

Lockley v. Deere and Co., 933 F.2d 1378 (8th Cir. 1991), also cited by petitioners, and also mistakenly attributed to the Ninth Circuit, merely cites *French* in deciding not to follow a Mississippi rule applicable to products liability cases.

DeGurules v. I.N.S., 833 F.2d 861 (9th Cir. 1987), is distinguishable. The court there decided to apply retroactively an amendment to the immigration laws that overruled the effect of this Court's decision as to what constituted "continuous physical presence in the United States." The decision had required deportation of certain aliens who had resided in the United States for more than seven years, but whose stay had been interrupted by incidental trips outside the United States. Further, the case was decided under *Bradley v. School Board*, 416 U.S. 696 (1974), without reference to *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204 (1940), and before *Landgraf*, by applying the "manifest injustice" standard. The court found no manifest injustice by applying the statutory change to the pending case, reasoning that the change in the law did not increase the obligation on a private party but instead reduced it, and that the party adversely affected by the change in law was the United States.

New England Power Co. v. United States, 693 F.2d 239 (1st Cir. 1982), is likewise distinguishable. In that case the court upheld the Interstate Commerce Commission's

decision to apply its own newly-promulgated market dominance standards to then-pending proceedings before it challenging various rail carrier rates. The court held that the standards were jurisdictional in nature in such cases. It also held that no manifest injustice resulted, also relying on *Bradley*, without reference to *Bowen*, and before *Landgraf*. The critical facts there were that all parties were aware at the time the complaints were filed that the new standards had already been proposed and were pending, that the cases were only in the beginning stages of discovery when the rules took effect, and that the rules were not an abrupt departure from established practice.

In each of those circumstances the changes in the law either did not effect private parties, or did not change the law or the expectations of the parties concerned. Here, applying retroactively a change in the burden of proof to a case already twice decided, with only certain narrow issues left for decision, presents much different concerns.

Finally, petitioners argue that they are entitled to have their disparate impact claims evaluated under §§ 104 and 105 of the Act because they merely reinstated the standards that prevailed in 1982. Pet. at 16. Such reasoning does not justify granting the petition because this Court expressly rejected an identical contention in *Rivers*.

In *Rivers* the section of the Act in question, § 101, was also intended to overrule a decision of this Court, *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Here, the sections are intended to overrule that portion of this Court's decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), dealing with the burden of proof on

business necessity. There, as here, this Court's decision did not overrule any of its prior decisions. *Wards Cove* is therefore the authoritative interpretation of the burdens of proof to be applied to disparate impact cases brought under Title VII of the Civil Rights Act of 1964, as interpreted by *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and intervening cases, both before and after it was decided, and until the 1991 Amendment took effect on November 21, 1991. This is so even if Congress read the earlier cases differently than this Court. *Rivers, supra,* Slip Op. at 14.

IV. CONCLUSION

Question One would merely require this Court to apply the analysis set down in *Rivers* and *Landgraf* to particular facts, a task best left to the lower courts. Moreover, a decision on Question One will have no bearing on the parties to this case unless the Court also decides that § 402(b) of the Civil Rights Act of 1991 is unconstitutional, a question of little national importance. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 93-1767

In the Supreme Court of the United States

OCTOBER TERM, 1994

FRANK ATONIO, ET AL., PETITIONERS

v.

WARDS COVE PACKING COMPANY, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether Sections 104 and 105 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074 which modify the standards for proving Title VII disparate impact claims, apply to cases pending on the Act's effective date.

2. Whether Section 402(b) of the Act, Pub. L. No. 102-166, 105 Stat. 1099, which exempts the present case from the Act's coverage, violates Article III or the equal protection component of the Due Process Clause.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A43) is reported at 10 F.3d 1485. The opinion of the district court (Pet. App. A218-A232) is unreported. This Court's previous opinion is reported at 490 U.S. 642. Previous opinions of the court of appeals are reported at 827 F.2d 439 (Pet. App. A44-A65), 810 F.2d 1477 (Pet. App. A66-A107), 768 F.2d 1120 (Pet. App. A110-A138), and 703 F.2d 329 (Pet. App. A139-A145). The district court's initial decision (Pet. App. A146-A214) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1993. A petition for rehearing was denied on January 31, 1994. Pet. App. A237-A238. The petition for

a writ of certiorari was filed on May 2, 1994 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1974, petitioners, who are nonwhite cannery workers, filed suit against several Alaskan cannery companies. Petitioners alleged that the companies had engaged in various practices that discriminated against nonwhite workers in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.* Pet. App. A3. In particular, petitioners alleged that the companies had engaged in nepotism in filling the better-paying jobs, had failed to inform nonwhite workers about openings in those jobs, had segregated workers in housing and messing facilities, and had engaged in race-labelling of jobs and housing. *Id.* at A4.

In 1983, the district court entered judgment against petitioners. The district court rejected petitioners' disparate treatment claims, and those claims are no longer at issue. The district court also rejected petitioners' disparate impact claims. It rejected some of those claims for failure of proof and others because it determined that subjective practices could not be challenged under a disparate impact theory. Pet. App. A4-A5.[1]

A panel of the court of appeals affirmed, but the Ninth Circuit ordered rehearing *en banc.* The *en banc* court held that subjective practices could be analyzed under a disparate impact theory and remanded the case to the panel.

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[1] Subjective practices are decisions based on the exercise of an employer's personal judgment or the application of inherently subjective criteria.

The panel then held that petitioners had established a prima facie case of disparate impact and remanded for consideration of the question of business necessity. Pet. App. A5-A6.

This Court affirmed the court of appeals' holding that subjective practices could be challenged under a disparate impact theory. It held, however, that petitioners had failed to establish a prima facie case. This Court also addressed two other issues relating to disparate impact cases. First, it held that plaintiffs who challenge one or more practices on a disparate impact theory have the burden of showing that each practice they challenge has a significant disparate impact. Second, it held that, should plaintiffs make such a showing, employers then have the burden of producing evidence that the practice significantly serves legitimate business goals. This Court remanded to the court of appeals, which in turn remanded to the district court. Pet. App. A6-A7.

On remand, the district court once again entered judgment for the companies. It found that petitioners had failed to show that any of the practices they had challenged had a disparate impact. The district court also determined that the companies had shown that their housing and messing practices served legitimate business goals. Pet. App. A7.

2. While petitioners' appeal was pending, Congress enacted the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. In direct response to this Court's decision in this case, Sections 104 and 105 of the Act altered the standards for proving disparate impact claims. Section 105 permits a plaintiff to challenge an employer's decision-making process as a single employment practice causing a disparate impact when the elements of that process are "not capable of separation for analysis." 105 Stat. 1074 42

U.S.C. 2000e-2(k)(1)(B)(i) (Supp. IV 1992). Section 105 also places upon the employer the burden to "demonstrate" that a practice causing a disparate impact is "job related for the position in question and consistent with business necessity." 42 U.S.C. 2000e-2(k)(1)(A)(i) (Supp. IV 1992). Under Section 104, the term "demonstrate[ ]" means "meets the burdens of production and persuasion." 42 U.S.C. 2000e(m) (Supp. IV 1992).

Section 402(b) of the Act provides, however, that

> [n]otwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.

105 Stat. 1099, *reprinted in* 42 U.S.C. 1981, note (Supp. IV 1992). That provision was intended to exempt this case (and only this case) from the provisions in the Act. Pet. App. A8-A9 & n.3.

Petitioners urged the court of appeals to apply the standards established by the 1991 Act to this case and to reject as unconstitutional the exemption set forth in Section 402(b). Pet. App. A9. The United States intervened to defend the constitutionality of Section 402(b).

3. The court of appeals affirmed in part, vacated in part, and remanded. Pet. App. A1-A43. The court noted that prior circuit precedent had held that the 1991 Act was retroactive, and it concluded that "this appeal can be resolved without further delay by treating the Act as retroactive." *Id.* at A10.

The court then upheld the constitutionality of Section 402(b). The court first considered petitioners' contention that Section 402(b) violates Article III under this Court's decision in *United States* v. *Klein,* 80 U.S. (13 Wall.) 128, 146 (1872), because it reflects "an attempt by Congress to

legislate an end to this litigation." Pet. App. A11. The court concluded that Section 402(b) does not "present[ ] a genuine *Klein* issue." Pet. App. 22a. The court explained that "[t]he provision does not purport to order any federal court to dismiss the workers' complaint, to enter judgment against them, or to make particular findings of fact or conclusions of law." *Ibid.* Instead, "the judiciary remains free to decide this case and every issue in it by the same principles and law that prevailed prior to the passage of the 1991 Act." *Ibid.*

The court further concluded that *Robertson* v. *Seattle Audubon Society,* 112 S. Ct. 1407 (1992), was "fatal" to petitioners' Article III claim. Pet. App. A11. In *Robertson,* this Court rejected an Article III challenge to a statute that directed the courts to resolve two pending cases in accordance with two new statutory standards. The court of appeals concluded that "[i]f the amendment in *Robertson* avoided separation of powers pitfalls, section 402(b) clearly does so as well." Pet. App. A12.

The court also rejected petitioners' contention that Section 402(b) violates the equal protection component of the Fifth Amendment Due Process Clause. Because the statute is "targeted at a particular case, and not at a racial class or other category subject to special constitutional protection," the court held that the statute was subject to rational basis review. Pet. App. A13. Applying that test, the court noted the government's argument that Congress was aware that this case had "consumed enormous time and resources," that this Court's decision had "provided clear-cut legal standards with which to resolve the matter," and that Congress therefore could rationally have concluded that "it did not wish to retroactively inject [new statutory provisions] into this lawsuit." *Id.* at A14. The court concluded that, "[u]nder the minimum standard of

rationality, the reason proffered by the Government qualifies as plausible and sufficient." *Id.* at A15. The court added that although there is "something jarring about legislation that is aimed at an individual target," the judiciary "generally lack[s] authority to invalidate a public law under the rational basis test merely because that law narrowly targets one or a few individuals." *Id.* at A15-A16 (citing cases).

Turning to the merits of petitioners' Title VII claims, the court found that petitioners had failed to show that subjective practices or nepotism had caused a disparate impact. Pet. App. A26-A32. The court held, however, that the district court did not give sufficient consideration to petitioners' claims that separate hiring channels deterred nonwhite workers from applying for better-paying jobs, that the companies could satisfy their business needs without relying on practices that resulted in segregated housing, and that the practice of race-labelling created a discriminatory work environment. *Id.* at A33-A41. The court remanded for consideration of those claims.

ARGUMENT

1. Petitioners contend that Section 402(b) singles out their case for unfavorable treatment in violation of the equal protection component of the Due Process Clause. Pet. 23-26. One of the general characteristics of legislation is that it applies to categories of persons, rather than to a particular individual or entity. Categorical legislation provides a significant degree of protection against arbitrary or irrational governmental action. As this Court recently reiterated, "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would im-

pose upon a minority must be imposed generally." *Madsen* v. *Women's Health Center, Inc.*, 114 S. Ct. 2516, 2524 (1994) (quoting *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 112-113 (1949)).

Congress, of course, has wide latitude to decide to what extent new legislation should apply to pending cases. And it has considerable discretion to draw general distinctions that may arguably be unfair or unwise. *FCC* v. *Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993).

Section 402(b) is framed in categorical terms. On its face, the exemption applies to "any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983." The filing date requirement in the provision suggests a purpose to reach the category of disparate impact cases that have been in litigation longest. The requirement of a date of first decision after October 30, 1983, however, is inexplicable except as an effort to capture this case and no other.

Legislation giving favored treatment to a single person or entity is not unprecedented. Tax exemptions sometimes take that form. And there is a long history of private bills of that character. See *Central States Pension Fund* v. *Lady Baltimore Foods, Inc.*, 960 F.2d 1339, 1342-1343 (7th Cir. 1992). In those contexts, however, a single person or entity receives a benefit, and the burden of that favored treatment is borne by the public at-large. In contrast, the entire weight of the favored treatment for Wards Cove Packing Co. falls on a single group of minority workers who are the plaintiffs in this case.

In rejecting petitioners' constitutional challenge, the court of appeals relied primarily on this Court's decision in *City of New Orleans* v. *Dukes*, 427 U.S. 297 (1976). That case involved a challenge to a local ordinance banning pushcarts from the French Quarter, but exempting push-

cart vendors who had continuously operated for eight years or more. Even though only two vendors fell within the exemption, this Court upheld its constitutionality. As the Court stressed in its opinion, however, that ordinance was "solely an economic regulation." *Id.* at 303. In addition, the exemption in *Dukes* readily could be understood on its face as an effort to protect the category of vendors who were most likely to have built up substantial reliance interests. *Id.* at 305. Those disadvantaged by the *Dukes* ordinance, moreover, included all other pushcart operators. To provide the plaintiffs in one pending case with significantly less protection against discrimination in the workplace than the plaintiffs in any other pending case poses questions that were not fully addressed or answered by *Dukes.*[2]

2. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that [a court] ought not to pass on questions of constitutionality * * * unless such adjudication is unavoidable." *Spector Motor Service, Inc.* v. *McLaughlin,* 323 U.S. 101, 105 (1944). That principle is applicable here. Petitioners' constitutional claim arises only if Sections 104 and 105 apply to pending cases. If they do not, then, as the court of appeals recognized, petitioners "cannot benefit from [them] in any event, and section 402(b) becomes superfluous." Pet. App. A9.

Understanding that a decision on the retroactivity of Sections 104 and 105 might remove the constitutional issue from the case, the court of appeals addressed that statutory question first. The court noted that its previous decision in *Estate of Reynolds* v. *Martin,* 985 F.2d 470 (9th Cir. 1993), had held the entire 1991 Act retroactive. It

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[2] For the reasons given by the court of appeals (Pet. App. A11-A13), Section 402(b) does not raise a serious Article III question.

therefore followed circuit precedent and treated Sections 104 and 105 as retroactive, necessitating a decision on the constitutionality of Section 402(b). Pet. App. A9-A10.

After the court of appeals issued its decision in this case, this Court issued its decision in *Landgraf* v. *USI Film Products,* 114 S. Ct. 1483 (1994). In *Landgraf,* the Court squarely rejected the premise of the *Martin* decision that the text of the 1991 Act required that it be applied to pending cases. 114 S. Ct. at 1493-1496. The Court held instead that each provision of the Act must be examined separately to decide whether it applies to pending cases. *Id.* at 1505. The Court also established general principles for resolving that issue. *Id.* at 1497-1505. Neither *Landgraf* nor the companion case of *Rivers* v. *Roadway Express, Inc.,* 114 S. Ct. 1510 (1994), decided whether Sections 104 and 105 apply to pending cases. That issue is therefore an open one.

Given the importance of the principle that constitutional questions should be avoided, if possible, we suggest that this court vacate the decision of the court of appeals and remand the case for that court's reconsideration of the question whether Sections 104 and 105 apply to pending cases in light of *Landgraf* and *Rivers.* Should it ultimately be concluded that Sections 104 and 105 do not apply to pending cases, it would obviate the need to decide whether Section 402(b) is constitutional.

Petitioners urge that this Court itself initially resolve the question whether Sections 104 and 105 apply to pending cases. Pet. 15-17. Such review would be premature. Not only has the court below not yet addressed that question in light of *Landgraf* and *Rivers,* the issue has also not been considered by any other court of appeals. This Court should not address a question of that nature in the first instance. Prior lower court consideration will illuminate the issues and, if no conflict of decisions arises, may make this Court's review unnecessary.

CONCLUSION

The petition for a writ of certiorari should be granted, the decision below vacated, and the case remanded for reconsideration in light of *Landgraf* and *Rivers*.

Respectfully submitted.

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No. 93-1767

IN THE
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October Term, 1994

FRANK ATONIO, ALAN LEW, CURTIS LEW, JOAQUIN ARRUIZA, RANDY DEL FIERRO, CLARKE KIDO, LESTER KURAMOTO, BARBARA VIERNES, as administratrix of the Estate of Gene Allen Viernes, MARGARET BACLIG, as administratrix of the Estate of Eugene Baclig, and all others similarly situated,

Petitioners,

v.

WARDS COVE PACKING COMPANY, INC., CASTLE & COOK, INC., COLUMBIA WARDS FISHERIES and UNITED STATES OF AMERICA

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Notably absent from the Government's brief is any assertion that the §402(b) exemption fulfills the guarantee of equal protection implicit in the Fifth Amendment. In fact, the Government acknowledges that *City of New Orleans v. Dukes*, 427 U.S. 297 (1976) -- the case the Court of Appeals "relied primarily on" (Brief of United States p. 7) -- does "not fully address[ ] or answer[ ]" the questions posed here (*id.* at 8).

Similarly absent from the Government's brief is any assertion that the equal protection issue falls short of the criteria for certiorari.

Significantly, the Government does not argue (as do the employers) that the narrowness of the §402(b) exemption suggests the absence of an issue of national importance. In fact, it is the narrowness of the exemption which is part of the constitutional vice. If the importance of the issue were measured by the scope of the exemption, then the classifications most in need of review would never be eligible for review by certiorari. *Cf. News America Publishing, Inc. v. F.C.C.*, 844 F.2d 800, 813 (D.C. Cir. 1988) ("Nowhere are the protections of the Equal Protection Clause more critical than when legislation singles out one or a few for disfavored treatment.")

While the Government does say the separation of powers challenge lacks merit, its argument on this issue is limited to a one-sentence footnote. (Brief of United States p. 8 n.2.)

The Government suggests the Court "remand[ ] for reconsideration in light of *Landgraf [v. USI Film Products*, 114 S.Ct. 1483 (1994)] and *Rivers [v. Roadway Express, Inc.*, 114 S.Ct. 1510 (1994)]. But if the Court accepts the Government's suggestion, it will likely find the parties before it once again in virtually the same posture one or two years from now. This case has already been pending twenty years without a conclusive ruling on liability. Additional delay would not serve anyone's interest.

The Court should grant certiorari to address the issues the employees raise in their petition.

If, however, the Court does remand for reconsideration in light of *Landgraf* and *Rivers*, it should also remand for reconsideration of the equal protection issue in light of the comments the Government makes in its brief.

DATED: August 30, 1994.

Respectfully submitted,

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Petitioners,

v.

WARDS COVE PACKING COMPANY and DOLE FOOD COMPANY, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' SUPPLEMENTAL BRIEF

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The United States in its brief in No. 93-1767 suggests that this Court summarily vacate the decision of the court of appeals and remand to reconsider the question of whether Sections 104 and 105 of the Civil Rights Act of 1991 apply to pending cases in light of *Landgraf v. USI Film Products*, 114 S.Ct. 1483 (1994), and *Rivers v. Roadway Express, Inc.*, 114 S.Ct. 1510 (1994). Respondents, Wards Cove Packing Company and Dole Food Company, Inc., submit this supplemental brief in opposition to the United States.

The Solicitor General's position conflicts with the longstanding policy of this Court not to issue the writ where the judgment lacks finality, except in extraordinary circumstances. *American Construction Co. v. Jacksonville, Tampa & Key West R. Co.*, 148 U.S. 372, 384 (1893); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *see Brotherhood of Locomotive Firemen v. Bangor & Arrostook R. Co.*, 389 U.S. 327, 328 (1967) (in denying *certiorari* stating: "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court").

The case now pends in the district court for further fact finding and a briefing schedule has been agreed to by the parties. That court will answer the three narrow questions posed by the court of appeals as to contentions of adverse impact based upon the use of "hiring channels," the feasibility of shifting housing accommodations after commencement of the canning season and the potential impact of ethnic "labeling" used by whites and non-whites alike. Brief of United States, 6, Pet. A33-A41.

Although petitioners argue that Sections 104 and 105 should be applied retroactively to this long-running controversy, the question of retroactivity may never be reached. The district court made initial findings that the employers' housing allocation was a reasonable business practice. Pet. A-190, 211, 231. Further development of those findings may make a determination of retroactivity of new standards on burden of proof and defenses posed by Section 104 unnecessary. Petitioners also argue that Section 105 relieves the employees of the need to prove which practices cause disparate impact. Pet. 12. Petitioners will likely be unable to prove that the selection process as a whole caused disparate impact because their statistics have been discredited and the Court of Appeals found no evidence to link even bottom line statistics to the use of subjective hiring criteria. Pet. A-28, 29, 31. Additional fact finding by the district court may make the retroactivity question moot as that court must in the first instance find disparate impact before causation becomes relevant. Thus, this case does not involve a controlling question of law which is fundamental to the further conduct of the case. *Cf. United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945).

As is clear from the submissions of petitioners and the United States, this case has been the subject of two district court decisions and six published appellate decisions.[1] The case period commenced during Richard Nixon's first term in office and we are in the thirteenth

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[1] An additional Court of Appeals' interlocutory decision of June 16, 1980, affirming the denial of a motion for preliminary injunction was not published.

year since trial. The case should not be interrupted for yet further delay on an issue which may have no bearing on its ultimate outcome.

Finally, a summary reversal and remand should not be granted where the arguments for retroactivity are so weak. A change in the burden of proof, or in causation requirements or in the elements of a defense after a trial are not supportable as "procedural" inasmuch as the strategy and conduct of the trial have already taken place. *See Landgraf*, 114 S.Ct. 1483, n.29.[2] Petitioners concede and the United States does not dispute that this Court has consistently regarded the burden of proof as substantive under the *Erie* rule. *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 446 (1959); *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943); *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208, 212 (1939).

In light of the foregoing, the petition should be denied.

DATED this 1st day of September, 1994.

Respectfully submitted,

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[2] Indeed, since the event is the trial itself, application of a new procedure is not retroactivity at all.